

## CHAPTER IV

### POST-INSPECTION PROCEDURES

- A. ABATEMENT.** The Abatement Verification Standard includes requirements that employers must follow, if they are cited for a VOSH violation, to ensure that they have abated the cited hazard(s).
- 1. Abatement Date and Period.** The abatement period shall be the shortest interval within which the employer can *reasonably* be expected to correct the violation. The establishment of the shortest practicable abatement date requires the use of the CSHO's professional judgment. An abatement date shall be set forth in the citation as a specific date, not a number of days. When the abatement period is very short (i.e., five working days or less) and it is uncertain when the employer will receive the citation, the abatement date shall be set so as to allow for a mail delay and the agreed-upon abatement time. When abatement has been witnessed by the CSHO during the inspection, each violation shall be documented as "Corrected During Inspection" on the VOSH-1B as well as "Abated On (date item corrected)" on the citation.
- a. Professional Judgment.** The CSHO shall exercise judgment that will generally be based on data found during the inspection and whatever subsequent information gathering is necessary. In all cases, the employer shall be asked for any available information about the time required to accomplish abatement and any factors unique to the employer's operation which may have an effect on the time needed for abatement.
- b. Factors to be Considered.** All pertinent factors shall be considered in determining a reasonable period. The following considerations may be useful in arriving at a decision.
- (1) The gravity of the alleged violation.
  - (2) The availability of needed equipment, material and personnel.
  - (3) The time required for delivery, installation, modification or construction.
  - (4) Training of personnel, including training scheduled by the employer and conducted by third parties.
- c. Extensions.** Abatement periods exceeding 30 calendar days should not normally be necessary, particularly for safety violations. Situations may arise; however, especially for health violations, in which extensive structural changes are necessary or in which new equipment or parts cannot be delivered within 30 calendar days. When an initial abatement date is granted that is in excess of 30 calendar days, the reason, if not self-evident, shall be documented in the case file.

*Note: Refer also to Section A.9. of this chapter regarding long term abatement dates for implementation of feasible engineering controls.*

Initial abatement dates in excess of six months from the citation issuance date may not be granted without prior approval of the Program Director. Initial abatement dates in excess of one year from the citation issuance date may not be granted without prior approval by the Commissioner.

- A. 2. Employer Abatement Plan.** For abatement periods greater than 90 calendar days, the Compliance Manager may require monitoring information from an employer. Abatement plans are not allowed for abatement periods of less than 91 days, or for other-than-serious citations. Progress reports are not allowed unless abatement plans are specifically required. The citation shall indicate any requirement for abatement plans and for progress reports. Abatement plans and progress reports may be required by a settlement agreement, and are not prohibited by the requirements of the Abatement Verification requirements in § 307 through § 320 of the *VOSH Administrative Regulations Manual*.
- 3. Verification of Abatement.** The Compliance Manager is responsible for determining if abatement has been accomplished. Abatement of all violations must be verified through CSHO observation, or through employer provided abatement certification, and additional abatement documentation when required by the citation.

Abatement **certification** is a brief statement provided by the employer attesting to when and how abatement was achieved. Abatement **documentation** is additional material submitted to show that abatement is complete and can include, but is not limited to, photos or videos, and receipts for materials and/or labor.

When abatement is not accomplished at the time of the inspection or the employer does not notify the Compliance Manager of the abatement by letter, verification shall be determined by a follow-up inspection. (*Refer to VOSH Program Directive 02-006A or its successor and § 307 of the Administrative Regulations Manual regarding Abatement Verification*).

- a. Condition Not Abated – Date Has Passed.** If the employer's abatement letter indicates that a condition has not been abated, but the date has passed, the Compliance Manager shall contact the employer for an explanation. If the explanation meets the test of sufficiency for a late request for modification of abatement, the employer shall be informed that a request for modification of abatement must be filed within 10 calendar days, or a notice of Failure-to-Abate may be issued. At the expiration of the 10 days provided, appropriate action shall be taken.

- A.3.**
- b. Request for Modification.** If a Petition for Modification of Abatement (PMA) (*refer to section A.4.d.*) does not meet all the requirements for such requests and the employer fails to provide the necessary information after being contacted a second time, the Compliance Manager shall object to the request for modification of abatement and, if appropriate, issue a Failure-to-Abate.
  - c. Expedited Informal Settlement Agreement (EISA).** Refer to the VOSH Program Directive on this topic for specific procedures for EISA.
  - d. Willful, Repeat, and Serious Violations.** All citations for willful, repeat, and serious violations require an employer to provide abatement documentation, such as written, videographic or photographic evidence of abatement.
  - e. Abatement During Inspection.** Employers are not required to certify abatement for violations which they promptly abate during the on-site portion of the inspection and whose abatement the CSHO observes.
  - f. Information Missing from Certificate.** Initial minor non-substantive omissions in an abatement certificate (e.g., lack of a definitive statement to the effect that the information being submitted is accurate) should be considered a *de minimus* violation. If minor deficiencies such as omitting the signature or date exist, the employer should be contacted by telephone to verify that the documents received were the ones they intended to submit. If so, the date stamp of the Regional Office can serve as the date on the document. A certification with an omitted signature should be returned to the employer to be signed, when determined to be beneficial by the Compliance Manager.
- 4. Follow-up When Employer Does Not Submit Required Material.** The CSHO shall use the following procedure:
- a. Phone Call 13 Days After Due Date.** If required material is not received within 13 calendar days after the due date (10 days after the due date, and another 3 calendar days added for mailing), telephone the employer and remind him/her of the requirement to submit the material and tell the employer that failure to respond will likely result in a further inspection.
  - b. Follow-up Inspection Assigned 20 Days After Due Date.** If the required material is not received within the next 7 calendar days after the phone contact, a follow-up inspection will normally be assigned.
    - (1)** During the time between the reminder letters and any further activity, efforts should be made to speak with the employer and determine why he/she has not complied. All communication efforts shall be documented in the case file.

**A.4.b.** (2) For instances where the reminder letter is returned to the regional office by the post office as undeliverable and telephone contact efforts fail, the Compliance Manager has the discretion to stop further efforts to locate the employer and document in the case file the reason for no abatement certificate.

**c. Follow-up Inspection Determinations.** Refer to VOSH Program Directive 02-006A or its successor.

**d. Non-follow-up Inspection Determinations.** In situations where it has been determined that a follow-up inspection will not be conducted, citations for failure to certify, submit documentation, abatement plans or progress reports may still be issued at the discretion of the Compliance Manager. All non-follow-up inspection determinations shall be approved and documented through a statement in the case file by the Compliance Manager. (Refer to section A.6.b.).

*NOTE: Follow-up inspections are sometimes conducted when employers have returned written verification of abatement, as a quality control measure. If a violation is found unabated in this type of an inspection, it shall be cited as a failure to abate. In addition, the case should be discussed with the Commonwealth's Attorney and the Office of Legal Support to determine if criminal penalties apply for providing false information regarding VOSH requirements. If the employer has provided written verification of abatement, and no follow-up inspection is conducted, but a later inspection (i.e., programmed, complaint) shows that the same hazard exists, refer to Chapter III, B.2.f.(7) for guidance on whether a failure to abate or repeated violation exists.*

## **5. Construction Activities.**

**a. Site Closure or Project Completion.** Construction site closure or hazard removal due to completing the structure or project shall only be accepted as abatement without certification if a CSHO physically verifies the site closure. Without CSHO-observed verification, the employer must certify to VOSH that the hazards have been abated through submission of an abatement certificate.

**b. Equipment or Program Related Violations.** Equipment-related and all program-related (e.g., crane inspection, hazcom, respirator, training, competent person, qualified persons, etc.) violations shall always require employer certification of abatement if cited serious, repeat or willful.

**c. Employer Office in Another Region.** For situations where the main office of the employer being cited is physically located in another regional jurisdiction, the Compliance Manager having the jurisdiction over the work site shall proceed as if the employer's main office were in the Regional Director's own jurisdiction, and shall notify the affected regional office of the communication with the employer.

- A.5.**      **d. Follow-up Inspection.** Where a follow-up inspection to verify abatement is deemed necessary, the affected regions shall determine the most efficient and mutually beneficial approach to conducting the inspection.

**6. Case File Documentation.**

- a. No Abatement Certificate.** If a case file is closed without an abatement certificate(s), the lack of an abatement certificate shall be justified through a statement in the case file by the Compliance Manager, addressing the reason for accepting each uncertified violation as an abated citation.
- b. No Follow-up Inspection Conducted.** If an employer fails to submit required abatement verification materials and it has been determined that a follow-up inspection will not be conducted, the reason shall be justified through a statement in the case file by the Compliance Manager. (Refer to Section A.5.d.).
- c. Retain All Documentation.** All abatement documentation (photos, employer programs, etc.) shall be retained in the case file.

**7. Effect of Contest Upon Abatement Period.**

- a. Contest of Citation.** Where the employer has filed a notice of contest to the citation within the contest period, the abatement period does not begin to run until the citation has become a final order. Under these circumstances, any follow-up inspection within the contest period shall be discontinued and a failure to abate notice shall not be issued. In situations where an *employee* has contested the abatement date, the abatement requirements of the citation remain unchanged.

***NOTE:** There is one exception to the above rule. If an early abatement date has been designated in the initial citation and it is the opinion of the CSHO and/or the Compliance Manager that the cited condition presents an imminent danger, appropriate imminent danger proceedings shall be initiated even when the employer has filed an appeal.*

- b. Abatement Date Affirmed.** If an employer contests an abatement date in good faith, a Failure to Abate Notice shall not be issued for the item contested until a final order affirming a date is entered, the new abatement period, if any, has been completed, and the employer has still failed to abate. (Refer to § 310 of the ARM).
- c. Only Penalty Contested.** Where an employer has contested only the assessed penalty, the abatement period continues to run unaffected by the contest.

- A.7. d. No Contest Filed.** Where the employer does not contest, the employer must abide by the date set forth in the citation even if such date is within the 15 working-day notice of the contest period. Therefore, when the abatement period designated in the citation is 15 working-days or less and a notice of contest has not been filed, a follow-up inspection of the worksite may be conducted for purposes of determining whether abatement has been achieved within the time period set forth in the citation. A failure to abate notice may be issued on the basis of the CSHO's findings.

*NOTE: Normally, a follow-up inspection would only be conducted in this circumstance if a serious violation with high gravity has been cited. (See Chapter I, B.3.c., Follow-up Inspections.)*

- 8. Long-Term Abatement Date for Implementation of Feasible Engineering Controls.** Long-term abatement is abatement which will be completed more than one year from the citation issuance date. In situations where it is difficult to set a specific abatement date when the citation is originally issued; e.g., because of extensive redesign requirements consequent upon the employer's decision to implement feasible engineering controls and uncertainty as to when the job can be finished, the CSHO shall discuss the problem with the employer at the closing conference and consult with the Compliance Manager following the inspection.

The CSHO and the Compliance Manager shall use their best judgment as to a reasonable abatement date. A specific date for final abatement shall, in all cases, be included in the citation. The employer shall not be permitted to propose their own abatement date in the abatement plan. (Refer to Section A.2. for more information on abatement plans.) If necessary, an appropriate application may be submitted later by the employer to modify the abatement date. (Refer to Section D.1. of this Chapter for PMAs.)

- a. Employer Abatement Plan.** The employer is required to submit an abatement plan outlining the anticipated long-term abatement procedures.
- (1)** Such a plan may be submitted for consideration by the Compliance Manager before setting the citation abatement date.
    - (a)** In that case, the citation may be delayed for a brief period with a notation explaining the delay placed in the case file.
    - (b)** If it appears that the citation might be delayed beyond 6 months from the date of the alleged violation, the citation shall be issued prior to full consideration of the plan; but the employer shall be given the opportunity to provide as much input as possible in the setting of the abatement period.
  - (2)** Whether or not a plan is submitted before issuing a citation, an abatement plan shall be provided for in the citation in addition to a final abatement date.

**A.8.(a)**

- (3)** When the plan is submitted, if the engineering or administrative corrections proposed by the employer appear to be all that are feasible based on the current technology, this fact may be agreed to between VOSH and the employer.

  - (a)** Such an agreement shall permit assurances in advance to the employer that the establishment will be in compliance where the provisions of the plan are fully implemented.
  - (b)** It shall be made clear in the agreement that the employer is not relieved from instituting further engineering (or administrative) controls as they become technically feasible, if it is likely that such further controls will lower employee exposure in such instances where without personal protective equipment (PPE) employee exposure remains over the PEL.
  - (c)** In all situations where an agreement is proposed, the advice of the Office of Legal Support shall be sought on the legal implications.
  - (d)** If the agreement is acceptable, the Office of Legal Support shall be requested to draft the agreement.
- (4)** A statement agreeing to provide the affected Regional Office with written periodic progress reports shall be part of the long-term abatement plan.

**9. Feasible Administrative, Work Practice and Engineering Controls.**

Where applicable, the CSHO shall discuss control methodology with the employer during the closing conference.

**a. Definitions.**

- (1) Engineering Controls.** Engineering controls consist of substitution, isolation, ventilation, and equipment modification.

  - (a)** Substitution may involve process change, equipment replacement or material substitution.
  - (b)** Isolation results in the reduction of the hazard by providing a barrier around the material, equipment, process or employee. This barrier may consist of a physical separation or isolation by distance.
  - (c)** Ventilation controls are more fully discussed in the OSHA Technical Manual.

**A.9.a.(1)**

(d) Equipment modification will result in increased performance or change in character, such as the application of sound absorbent material.

(2) **Administrative Controls.** Any procedure which significantly limits daily exposure by control or manipulation of the work schedule or manner in which work is performed is considered a means of administrative control. The use of personal protective equipment is *not* considered a means of administrative control. Employee rotation as an administrative control shall not be used as a method of complying with the permissible exposure limits of carcinogens.

(3) **Work Practice Controls.** Work practice controls are a type of administrative control by which the employer modifies the manner in which the employee performs assigned work. Such modification may result in a reduction of exposure through such methods as changing work habits, improving sanitation and hygiene practices, or making other changes in the way the employee performs the job.

(4) **Feasibility.** Abatement measures required to correct a citation item are feasible when they can be accomplished by the employer. The CSHO, following current directions and guidelines, shall inform the employer, where appropriate, that a determination will be made as to whether engineering or administrative controls are feasible.

(a) **Technical Feasibility.** Technical feasibility is the existence of technical know-how as to materials and methods available or adaptable to specific circumstances which can be applied to cited violations with a reasonable possibility that employee exposure to occupational hazards will be reduced. The Compliance Manager is responsible for making determinations that engineering or administrative controls are feasible.

1 Sources which can provide information useful in making this determination are the following:

a Similar situations where adequate engineering controls do, in fact, reduce employee exposure.

b Written source materials or conference presentations that indicate that equipment and designs are available to reduce employee exposure in similar situations.



**A.9.a.(4)(a)1**

- c** Studies by a qualified consulting firm, professional engineer, industrial hygienist, or insurance carrier that show engineering controls are technically feasible.
- d** Studies and materials collected and prepared by VOSH or OSHA's Directorate of Compliance Programs, the Directorate of Technical Support or the Assistant Regional Administrator for Technical Support.
- e** Equipment catalogs and suppliers that indicate engineering controls are technically feasible and are available.
- f** Information provided by other government agencies when their regulations apply to the operations involved and which may affect or limit the design or type of controls that may be used for abatement.

- 2** VOSH's experience indicates that feasible engineering or administrative controls exist for most hazardous exposures.

**(b) Economic Feasibility.** Economic feasibility means that the employer is financially able to undertake the measures necessary to abate the citations received. The CSHO shall inform the employer that, although the cost of corrective measures to be taken will generally not be considered as a factor in the issuance of a citation, it will be considered during an informal conference or during settlement negotiations.

- 1** If the cost of implementing effective engineering, administrative, or work practice controls or some combination of such controls, would seriously endanger the employer's financial condition so as to result in the probable shut down of the establishment or a substantial part of it, an extended abatement date shall be set when postponement of the capital expenditures would have a beneficial effect on the financial performance of the employer.
- 2** If the employer raises the issue that the company has other establishments or other locations within the same establishment with equipment or processes which, although not cited as a result of the present inspection, nevertheless would require the same

abatement measures as those under citation, the economic feasibility determination shall not be limited to the cited items above. In such cases, although the employer will be required to abate the cited items within the time allowed for abatement, the opportunity to include both the cited and the additional items in a long range abatement plan shall be offered. This can be accomplished by a corporate wide settlement agreement. *Contact the Office of Legal Support for information on settlement agreements.*

**A.9.a.(4)(b)**

- 3** When additional time cannot be expected to solve the employer's financial infeasibility problem, the Program Director shall refer the problem to the Commissioner for a decision in accordance with the guidelines.
- 4** Requirements that would threaten the economic viability of an entire industry cannot be considered economically feasible.

*NOTE: If an employer's level of compliance lags significantly behind that of their industry, allegations of economic infeasibility will not be accepted.*

**B. CITATIONS**

**1. Issuing Citations.**

- a. Sending Citations to the Employer.** Citations shall be issued in accordance with the requirements of § 260 of the *Administrative Regulations Manual*. Citations shall be sent by certified mail or professional courier/parcel delivery service. Hand delivery of citations to the employer or an appropriate agent of the employer may be substituted for certified mailing if it is believed that this method would be more effective. Professional messenger service is acceptable. A signed receipt shall be obtained whenever possible; otherwise, the circumstances of delivery shall be documented in the file.
- b. Sending Citations to Employees or Employee Representative.** Upon request, the Regional Office shall mail copies of citations to qualified employee representatives or any employee.

**B. 2. Amending or Administratively Vacating Citation and Notification of Penalty.**

**a. Citation Amendment or Administrative Vacating Justified.** A citation shall be replaced by an amended citation, or administratively vacated when information is presented to the Regional Director which indicates a need for such amendment or vacation under certain conditions which may include:

- (1)** Administrative or technical error.
  - (a)** Citing of an incorrect standard.
  - (b)** Incorrect or incomplete description of the alleged violation.
  - (c)** A serious violation which should originally have been classified as other-than-serious.
- (2)** The Compliance Manager shall consult with the Regional Director before amending or withdrawing a citation under the following circumstances:
  - (a)** Additional facts establish a valid affirmative defense.
  - (b)** Additional facts establish that there was no employee exposure to the hazard.
  - (c)** Additional facts establish a need for modification of abatement date, penalty or reclassification of citation items.
  - (d)** Citations issued to the wrong employer.

**b. Citation Amendment or Administrative Vacating Not Justified.** A citation shall *not* be amended or administratively vacated under certain conditions which include:

- (1)** The 15-working days for filing a notice of contest has expired and the citation has become a final order.
- (2)** Employee representatives have not been given the opportunity to present their views unless the amendment/vacation involves only an administrative or technical error.
- (3)** Editorial and/or stylistic modifications.

**c. Procedures for Amending or Administratively Vacating Citations.** The following procedures are to be followed in amending or administratively vacating citations:

- (1) Regional Director.** The Regional Director or his designee shall issue an amended citation when becoming aware of any of the conditions in section B.2.a. This will replace a previous citation in its entirety, or if the entire citation and notice is to be withdrawn,

will administratively vacate the citation and notice. A copy of the original citation shall be attached to the amended Citation and Notification of Penalty Form when the amended form is sent to the employer. In the latter case, the Regional Director shall follow the procedures below to notify the employer and employee representative, where applicable, of the amended or vacated citation.

**B.2.c.**

- (2) When Amendments Change Classification of Citation Items.** Changes initiated by the Regional Director without an informal conference are the exception. In such cases, if proposed amendments to citation items change the classification of the items; e.g., serious to other-than-serious, the original citation items shall be replaced with new, appropriate citation items on the amended citation.
- (3) Elements of Amended Citation and Notice.** The amended Citation and Notification of Penalty Form (VOSH-2) shall clearly indicate that:

  - (a)** The employer is obligated to post the amended citation until the amended violation has been corrected or for three working days, whichever is longer;
  - (b)** The period of contest of the amended VOSH-2 will begin from the day following the date of receipt of the amended Citation and Notification of Penalty Form; and
  - (c)** The contest period does not apply to the unchanged portions of the citation.
- (4) Citation Vacated in Entirety.** When circumstances warrant, a citation may be administratively vacated in its entirety by the Regional Director, Compliance Manager, Program Director, Director of VOSH Programs, or the Commissioner. The Compliance Manager must place justifying documentation in the case file. If a citation is to be withdrawn, the following procedures apply:

  - (a) Letter to Employer.** A letter withdrawing the Citation and Notification of Penalty should be sent to the employer, by the Compliance Manager. The letter should refer to the original citation and penalty, state that they are vacated, and direct that the letter be posted by the employer for three working days in those locations where the original citation was posted. The letter should direct the employer to discard the original citation.

**B.2.c.(4)**

**(b) Copy to Employee or Employee Representative.**

When applicable to the specific situation (e.g., an employee representative participated in the walkaround inspection, the inspection was in response to a complaint signed by an employee or an employee representative, or the withdrawal resulted from an informal conference or settlement agreement in which an employee representative exercised the right to participate), a copy of the letter shall also be sent to the employee or the employee representative as appropriate. A copy of the withdrawal letter shall also be sent to any employee representative who has received a copy of the Citation and Notice, according to section B.1.b., above.

**(c)** The instructions contained in this section, with appropriate modification, are also applicable to the amendment of the notification of Failure to Abate Alleged Violation, VOSH-2B Form.

**(d)** The assistance of the Program Director shall be sought when amendments cause complicated drafting problems.

**C. PENALTIES.**

**1. General Policy.** VOSH has always taken the position that the penalty structure provided under § 40.1-49.4, *Code of Virginia*, is intended primarily to provide an incentive toward correcting violations voluntarily, not only to the offending employer, but also to other employers who may be in violation of the same infractions of the standards or regulations.

**a. Deterrent to Violations.** The Department has always taken the position that penalties are not designed as punishment for violations or as a source of income for the Department; however, the penalty amounts should be sufficient to serve as an effective deterrent to violations.

**b. Other-Than-Serious Violations.** In accordance with § 40.1-49.4.G., *Code of Virginia*, other-than-serious or regulatory violations may be cited without a penalty. There is no statutory requirement that a penalty must be assessed when the violation is not serious; but a penalty must be assessed when the violation is serious.

**2. Civil Penalties.** The following factors are used by the CSHO Application Software to calculate a proposed penalty.

**a. Type of Violation as a Factor.** In assessing civil penalties for violations, a distinction is made between serious and other-than-serious violations.

**C.2.a.**

- (1) **Serious.** The maximum penalty that may be assessed for a serious violation is \$7,000.
- (2) **Other-Than-Serious.** The maximum penalty that may be assessed for an other-than-serious violation is \$7,000.
- (3) **Willful or Repeated.** In the case of willful or repeated violations, a civil penalty of up to \$70,000 may be assessed, but the penalty may not be less than \$5,000 for a willful violation.
- (4) **Regulatory Violations.** The maximum penalty that may be assessed for an other-than-serious regulatory violation is \$7,000.
- (5) **Failure to Abate.** Penalties for failure to abate a violation may be up to \$7,000 for each calendar day that the violation continues beyond the final abatement date.

**b. Statutory Authority.** Section 40.1-49.4.A.4.(a) provides the Commissioner with the statutory authority to assess civil penalties for violations of § 40.1-49.4.

- (1) Section 40.1-49.4.H., *Code of Virginia*, provides that any employer who has received a citation for an alleged violation of a serious nature shall be assessed a civil penalty of up to \$7,000 for each violation.
- (2) Section 40.1-49.4.G., *Code of Virginia*, provides that, when the violation is specifically determined to be other-than-serious, a civil penalty of up to \$7,000 may be assessed for each violation.
- (3) Section 40.1-49.4. G., *Code of Virginia*, provides that, when violations of certain posting requirements (refer to Section C.2.p.) are cited, a civil penalty of up to \$7,000 shall be assessed.

**c. Minimum Penalties.** The following guidelines apply:

- (1) **Serious.** The minimum penalty amount for serious violations shall be \$100. (See C.2.i. in this Chapter.)
- (2) **Willful.** The assessed penalty for any willful violation shall not be less than \$5,000. This is an OSH Act statutory minimum and not subject to administrative discretion.

**d. Penalty Factors.** Section 40.1-49.4.A.4(a), *Code of Virginia*, provides that, in assessing penalties, the Department shall give due consideration to the following factors:

**C.2.d**

- (1) The gravity of the violation,
- (2) The size of the business (i.e., number of employees),
- (3) The good faith of the employer, and
- (4) The employer's history of previous violations.

Neither a penalty calculation factor (e.g. probability assessment factors), nor penalty adjustment factor (e.g. the gravity of the violation, size of the business, good faith of the employer, or the employer's history of previous violations) shall materially affect the final penalty calculation if it would tend to dilute the penalty excessively.

**EXAMPLE:** In a particularly dangerous trenching situation or in a confined space where there is insufficient oxygen to support life, even when only one or two employees are exposed, it may be appropriate to reduce the weight that might be otherwise given to the number of employees exposed.

- e. **Gravity of Violation.** The gravity of the violation primarily determines penalty amounts. It shall be the basis for calculating the basic penalty for both serious and other-than-serious violations.

- (1) **Gravity Factors.** To determine the gravity of a violation, the following two assessments shall be made:
  - (a) The **severity** of the injury or illness which could result from the alleged violation.
  - (b) The **probability** that an injury or illness could occur as a result of the alleged violation.
- (2) **Other Penalty Factors.** The size of the business, the good faith of the employer, and the history of previous violations shall be taken into account in deciding whether and to what extent the gravity-based penalty (GBP) may be reduced or increased.
- (3) **Severity Assessment.** The classification of the alleged violation(s) as serious or other-than-serious, in accordance with the instructions in Chapter IV, B.2., is based on the severity of the injury or illness which could *reasonably* be expected to result from the employee's exposure to the hazard. This classification constitutes the first step in determining the gravity of the violation. The most serious injury or illness which is reasonably predictable as a result of an employee's exposure to the safety or health hazard cited shall be assigned a severity assessment in accordance with the following factors:

**C.2.e.(3)**

- (a) High Severity.** This would include death from injury or illness, injuries involving permanent disability, or chronic, irreversible illnesses.
- (b) Medium Severity.** This would include injuries or temporary, reversible illnesses resulting in hospitalization, substantial outpatient care of a variable but limited period of disability.
- (c) Low Severity.** This would include injuries or temporary, reversible illnesses not resulting in hospitalization and requiring only minor supportive treatment, i.e., limited outpatient care.
- (d) Minimal Severity.** This would include other-than-serious violations. Although such violations reflect conditions which have a direct and immediate relationship to the safety and health of employees, the injury or illness most likely to result would probably not cause death or serious physical harm.

- (4) Probability Assessment.** The probability (likelihood or chance) that an injury or illness would result from a hazard affects the amount of the penalty to be assessed. However, probability has *no* role in determining the classification of the violation.

To determine penalty, the CSHO, using professional judgment, shall identify and evaluate all of the factors influencing the probability of the occurrence of an injury or illness and shall assign them a weight in accordance with the relative contribution of each.

Probability shall be categorized as either greater or lesser probability:

- (a) Greater probability.** This applies when the likelihood that an injury or illness will occur is relatively high, for example, when a serious injury or near miss has actually occurred. The violation shall be assessed as “greater probability.”
- (b) Lesser probability.** This applies when the likelihood that an injury or illness will occur is judged to be relatively low.
- (c) Violations.** When violations likely to result in injury and/or illness are involved, the following circumstances shall be considered (and documented in the case file).



- 1** **Probability for Imminent Danger.** The CSHO shall assign a greater probability value for hazards determined to be imminent danger. Documentation to support the imminent danger shall be included on the VOSH -1C and be noted on the probability line of the VOSH -1D. See Chapter III, F. for definition and procedures for imminent danger.
- 2** **Safety Violations.** Among the factors to be considered are:
  - a** Frequency of exposure/number of employees exposed.
  - b** Employee proximity to the hazard.
  - c** Weather/working conditions.
  - d** Employee skill level.
  - e** Employee awareness of hazard.
  - f** Pace/speed/nature of task/work.
  - g** Use of personal protective equipment.
  - h** Other mitigating circumstances.

**EXAMPLE:**

Greater Probability: Five employees exposed 24 hours per week, installing roofing materials on a 10/12 pitch roof, gusty wind and showers. Two of the employees have less than two weeks experience, no fall protection equipment on site, no documented safety training or orientation.

**Versus:**

Lesser Probability: Two employees exposed 4 hours per week, installing roofing materials on a 4/12 pitch roof, sunny and fair weather, both workers having over three years experience.

- 3** **Health Violations.** Program violations are **not** included in probability assessment, but are considered separately in Section C.2.f. Health violations typically involve exposure to chemicals, noise, infectious agents, heat stress, or non-ionizing radiation.

**C.2.e.(4)(c)3**

- a** Number of workers exposed to the hazardous conditions, both at the same time and sequentially.
- b** Duration of employee overexposure to hazardous levels of contaminants or other illness-producing conditions.
- c** Use of appropriate personal protective equipment; whether, for example, such equipment is utilized by all exposed employees and the employer has an effective PPE program in effect should be mentioned, or whether it is not utilized by any of the exposed employees and the employer has no program.
- d** Medical surveillance program is in place as appropriate and effectively protects the employees, and a defective program which only partially and inadequately protects them, or no medical surveillance program is in effect.

**4 Elements of Actual or Potential Exposure.**

The following three items shall normally be considered for actual or potential exposure in relation to the hazard and standard violated, and weighted accordingly (as documented in the case file). Violations with actual overexposure will usually receive a higher probability factor than comparable violations with potential overexposure. All violations shall be considered for conditions, circumstances, and/or practices at the worksite which would affect the likelihood of harmful contact, ingestion, inhalation, or other harmful exposure cited.

- a Level of Exposure.** Generally, the greater the level of exposure, the greater the probability of harm. Inhalation exposure shall be considered in relation to the level above the PEL, STEL, ceiling, IDLH, or proximity to the lethal level. Ingestion or contact exposure shall take into account area and amount of contaminant in solid or liquid form, and relation to the likelihood of

harmful exposure. Noise shall be considered for the level above the PEL. Other agents shall be considered in relation to the level above established limits or for the intensity of exposure where there is a dose/effect relationship.

**C.2.e.(4)(c)4**

**b Frequency/Duration of Employee Overexposure.** Generally, the greater the frequency or length of exposure, the greater the probability for harm. Frequency of exposure (how often) may be more significant for acutely acting agents, whereas duration (how long) may be more significant for chronically acting agents.

**c Number of Employees Exposed.** The probability of harm is usually dependent upon the number of employees exposed. An exception would be when the exposure situation reaches an upper level in which all would be affected if the event or exposure occurred.

**5 Other Considerations in Determining Probability.** The following two items may also be considered in determining probability. These considerations will be used less often, but the CSHO shall weigh them into the probability assessment as applicable (and document in the case file.)

**a Personal Protective Equipment.** When the use of appropriate PPE is a factor, the CSHO shall consider whether such equipment *is* utilized by all exposed employees and the extent to which such equipment is *effectively* utilized, if at all.

**b Medical Surveillance.** Where medical surveillance is a factor, the CSHO shall consider if it effectively protects the employees or if it is a defective program which only partly and inadequately protects them, or no medical surveillance at all is in effect.

**C.2.e.(4)**

**(d) Other Factors Affecting Probability.** There are other factors which may significantly affect the probability that the hazard will produce an injury or illness. They shall also be considered and documented:

**1 Mitigating Circumstances.** Mitigating circumstances that may lower the probability, such as specific safety or health instructions, effective training programs, evidence of correction underway, warning signs and labels or special procedures, or mandatory administrative controls providing some, though not complete protection, may be used to lower the probability.

**2 Contributing Circumstances.** On the other hand, contributing circumstances may be used to raise probability. This would include inappropriate or inadequate safety or health instructions, inadequate or no training, or widespread hazardous conditions or faulty equipment, with little or no attempt to control them, may be used to raise the probability.

**(e) Final Probability Assessment.** All of the factors outlined above shall be considered together in arriving at a final probability assessment.

**1** A factor shall not materially affect the final probability assessment if, based on the professional judgment of the CSHO as documented in the case file, it:

**a** Does not significantly influence the probability of an injury- or illness- causing condition, or

**b** Would tend to dilute the penalty excessively.

**EXAMPLE:** In a particularly dangerous trenching situation or in a confined space where there is insufficient oxygen to support life, even when only one or two employees are exposed, it may be appropriate to reduce the weight given to the number of employees exposed.

- 2 When strict adherence to the probability assessment procedures would result in an unreasonably high or low gravity, the CSHO shall use professional judgment to adjust the probability appropriately. Such decisions shall be adequately documented in the case file.

- f. **Program Violations.** Certain program and certification requirements have specific performance criteria within the body of their codes and can be readily processed through the gravity based penalty (GBP) structure. These include, but are not limited to: hazard communication program, respirator protection program, confined space entry program, bloodborne pathogen program, and the hearing conservation program. (*Refer to the applicable program directive for further guidance*).

Other program and certification requirements are not as readily processed through the GBP structure. These include, but are not limited to: accident prevention program, first aid certification, fall protection work plan, lockout/tagout program, logging plan, effective supervision, etc.

- (1) **Classification.** The following procedures shall be followed in determining the severity of the program violation:
- (a) **Other-than-serious.** Program violations are classified as other-than-serious when it is documented that the employer does not have a written program or the program is missing one (1) or more element(s) *and no related serious hazards exist*.
- (b) **Serious.** Program violations are classified as serious when it is documented that the employer does not have the required written program or certification *and it can be documented that a related serious hazard is associated with a program deficiency*.

- g. **Gravity-Based Penalty (GBP).** The GBP is an unadjusted penalty and is calculated in accordance with the following procedures:

- (1) **Severity and Probability.** The GBP for each violation shall be determined based on an appropriate and balanced professional judgment, combining the severity assessment and the final probability assessment.
- (2) For serious violations, the GBP shall be assigned on the basis of the following scale:

| <u>Severity</u> | <u>Probability</u> | <u>GBP</u> |
|-----------------|--------------------|------------|
| High            | Greater            | \$5,000    |
| Medium          | Greater            | \$3,500    |
| Low             | Greater            | \$2,500    |
| High            | Lesser             | \$2,500    |
| Medium          | Lesser             | \$2,000    |
| Low             | Lesser             | \$1,500    |

*NOTE: The gravity of violation is defined by the GBP*

A high gravity violation is one with GBP of \$5,000 or greater.

A moderate gravity violation is one with a GBP between \$2,000 and \$3,500.

A low gravity violation is one with GBP of \$1,500 or below.

**C.2.g.**

- (3) Regulatory Violations.** Penalties to be assessed for regulatory violations are discussed in C.2.n. of this chapter.
- (4) Adjusted Penalty Amount.** The CSHO Application Software shall be used for determining appropriate adjusted penalties for violations, which consider the employer's good faith, size of business, and history.
- (5) O-T-S Severity Assessment.** For other-than-serious safety and health violations, there is no severity assessment:
  - (a)** Other-than-serious safety and health violations judged to be of greater probability shall be assigned a GBP of \$1,000 to which appropriate adjustment factors shall be applied.
  - (b)** Other-than-serious safety and health violations judged to be of lesser probability shall be cited with no penalty.
  - (c)** Penalties to be proposed for other-than-serious regulatory violations are discussed in the section covering regulatory violations.

**h. Gravity Calculations for Combined or Grouped Violations.**

Combined or grouped violations are normally considered as one violation and shall be assessed one GBP. (For guidance on when to combine or group violations see Chapter III, B.6.) The following procedures apply to the calculation of penalties for combined and grouped violations:

**(1) Combined Violations.** The severity and the probability assessments for combined violations shall be based on the instance with the highest gravity. It is not necessary to complete the penalty calculations for each instance or sub item of a combined or grouped violation if it is clear which instance *or* sub item will have the highest gravity.

**(2) Grouped Violations.** For grouped violations, the following special guidelines shall be adhered to:

**(a) Severity Assessment.** There are two considerations to be kept in mind in calculating the severity of grouped violations:

**1** The severity assigned to the grouped violation shall be no less than the severity of the most serious injury or illness that could reasonably be expected to result from the employee's exposure to the hazard on any single item.

**2** If a more serious injury or illness is reasonably predictable from the grouped items than from any single violation item, the more serious injury or illness shall serve as the basis for the calculation of the severity factor of the grouped violation.

**(b) Probability Assessment.** There are two considerations to be kept in mind in calculating the probability of grouped violations:

**1** The probability assigned to the grouped violation shall be no less than the probability of the item which is most likely to result in an injury or illness.

**2** If the overall probability of injury or illness is greater with the grouped violation than with any single violation item, the greater probability of injury or illness shall serve as the basis for the calculation of the probability assessment of the grouped violation.

In addition, it should be kept in mind that some individual probability factors may be increased by grouping, and others may not. The increased values shall be used in the probability calculation if, in the

professional judgment of the CSHO, a more appropriate assessment will result. For example, the number of employees exposed may be increased, while the proximity factor may not.

**C.2.h.(2)**

**(c) Gravity-Based Penalty.** A single severity assessment and a single probability assessment for the combined or grouped violation will result from the foregoing considerations. That result shall be the basis for determining an appropriate GBP for the violation item according to the guidelines.

**i. Penalty Adjustment Factors.** Since these adjustment factors are based on the general character of a business and its safety and health performance, the factors shall generally be calculated only once for each employer. After the classification and probability ratings have been determined for each violation, the adjustment factors shall be applied subject to the limitations indicated in the following paragraphs.

- (1)** Penalties assessed for violations that are classified as high severity and greater probability shall be adjusted only for size and history.
- (2)** Penalties assessed for violations that are classified as repeated shall be adjusted only for size.
- (3)** Penalties assessed for regulatory violations which are classified as willful shall be adjusted for size. Penalties assessed for violations classified as willful shall be adjusted only for size and history.

*NOTE: If one violation is classified as willful, no reduction for good faith can be applied to any of the violations found during the same inspection. The employer cannot be willfully in violation and at the same time acting in good faith.*

**(4)** The rate of penalty reduction for size of business, employer's good faith and employer's history of previous violations shall be calculated on the basis of the criteria described in the following paragraphs:

**(a) Size.** A maximum penalty reduction of 60 percent is permitted for small businesses. "Size of business" shall be measured on the basis of the maximum number of employees of an employer at all workplaces at any one time during the previous 12 months. Information on the total number of an employer's employees can generally be obtained at the inspected worksite. However, on occasion, it may be necessary to obtain or confirm the information from the employer's headquarters.



**C.2.i.(4)(a)**

**1** The rates of reduction are as follows:

| <u>Employees</u> | <u>Percent Reduction</u> |
|------------------|--------------------------|
| 1-25             | 60                       |
| 26-100           | 40                       |
| 101-250          | 20                       |
| 251 or more      | none                     |

**2** When a small business has one or more serious violation(s) of high gravity or a number of serious violations of moderate gravity indicating a lack of concern for employee safety and health, the Compliance Manager may determine that only a partial reduction in penalty shall be permitted for size of business.

**3** An employer's ability to pay a penalty shall not normally be investigated or considered in determining the penalty reduction for size of business.

**4** However, if an employer presents convincing evidence at an informal conference of inability to pay a penalty because of financial difficulties, the Regional Director may determine that a penalty reduction or a penalty installment payment plan is appropriate. Such a determination shall be documented in the case file.

**(b) Good Faith.** A penalty reduction of up to 25 percent is permitted in recognition of an employer's "good faith." No *single* factor shall be used to determine good faith. Some of the factors to be considered in determining good faith are:

**1** The employer's awareness of VOSH requirements.

**2** Whether any efforts were made to comply with safety standards before the inspection.

**3** If possible, whether the employer promptly abates violations during the inspection.

**4** The employer's cooperation/attitude during the inspection.

**C.2.i.(4)(b)**

- 5** The employer's overall attempts to implement safety and health in the workplace, including a safety and health program.

**EXCEPTION: If one willful violation is found, no reduction for good faith can be applied to any of the violations found during the same inspection. As stated above, an employer cannot be willfully in violation of the Act and at the same time be acting in "good faith."**

- 6** A reduction of 25 percent shall normally be given if the employer has a written safety and health program (as documented during the inspection) that has been effectively implemented in the workplace, and also:

- a** Provides for appropriate management commitment and employee involvement; worksite analysis for the purpose of hazard identification; hazard prevention and control measures, and safety and health training.

*NOTE: One example of a framework for such a program is given in OSHA's voluntary "Safety and Health Program Management Guidelines," Federal Register, Vol. 54, No. 16, January 26, 1989, pp. 3904-3916, or later revisions as published.*

- b** Has deficiencies that are only incidental.

- c** Includes all programs required under OSHA standards applicable to the workplace (e.g., hazard communication, lockout-tagout, hazardous materials and emergency response, safety and health programs for construction [§ 1926.20] and trenching and excavation).

- 7** A reduction of 15 percent shall normally be given if the employer has a documentable and effective safety and health program, but with no more than only incidental deficiencies. For example, an acceptable program will be documentable by such means as the minutes of employee safety and health meetings, employee training sessions, or other evidence of implemented programs applicable to the workplace.

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**C.2.i.(4)(b)**

- 8** Again, no reduction shall be given to an employer who has no safety and health program or where a willful violation is found.
- 9** Only these percentages (15% or 25%) may be used to reduce penalties due to the employer's good faith; no intermediate percentages shall be used.
- 10** An employer whose inspection history includes fatality-related violations or has a willful or a significant number of serious violations within the previous three years may not receive a reduction for good faith.

- (c) History.** A reduction of 10 percent shall be given to employers who have not been cited by VOSH for any serious, willful or repeated violations in the past three years.
- (d) Total Adjustment.** The total adjustment will normally be the sum of all the adjustment factors.

- (5)** No penalty reduction factors may be applied to any violation which has directly contributed to a fatality. Such a violation shall be penalized at \$7,000 for each serious and \$70,000 for each willful and repeat.

- (a) Ability to Pay.** An employer's ability to pay a penalty shall not normally be investigated or considered in determining any penalty reduction. However, if an employer presents convincing evidence of inability to pay a penalty because of financial difficulties at an informal conference, the Regional Director may determine that a penalty reduction is appropriate. Such a determination shall be documented in the case file.

- j. Effect on Penalties If Employer Immediately Corrects or Initiates Corrective Action.** Appropriate penalties will be assessed with respect to an alleged violation after being informed of such alleged violation by the CSHO, even though the employer immediately corrects or initiates steps to correct the hazard. Such correction may be considered in calculating good faith.

- k. Failure to Abate.** Section 40.1-49.4.I., *Code of Virginia*, provides criteria for assessing civil penalties for failure to abate a violation. A penalty of not more than \$7,000 may be assessed for each day the violation continues past the final abatement date.

**C.2.k.**

- (1) Application.** A Notification of Failure to Abate Alleged Violation (VOSH-2B) shall be issued in cases where violations have not been corrected as required. Failure to abate penalties shall be applied when an employer has not corrected a violation which was cited previously when the previous citation has become a final order. A good faith but unsuccessful effort to abate the violation shall be taken into consideration when determining the appropriate penalty amount as indicated in later sections.
- (a) No Employer Contest.** If a timely notice of contest has not been filed, the citation and proposed penalties shall be deemed to be a final order of the Commissioner upon the expiration of the contest period and not subject to review by any court or agency. Penalties for failure to abate shall be applied where abatement has not been accomplished.
- (b) Employer Contests Alleged Violation(s).** If an employer contests one or more of the alleged violations, the period for abatement does not begin to run, for the contested items, until the day following the entry of the final order affirming the citation by the Circuit Court or by the Supreme Court in the case of an appeal.
- 1** If the employer contests only the amount of the proposed penalty, the employer must correct the alleged violation within the prescribed abatement period.
  - 2** If an employer contests an abatement date in good faith, a Failure to Abate notice shall not be issued for the item contested until a final order affirming a date is entered, the new abatement period, if any, has been completed, and the employer has still failed to abate.

**EXCEPTION: When a high gravity serious hazard is cited with an abatement date of less than 15 working days, a follow-up inspection may be scheduled after expiration of the abatement period, but still within the 15-day notice of contest period, provided that the employer has not actually filed such a notice.**

- (2) Employer Contest.** If an employer contests one or more of the alleged violations, the period for abatement does not begin to run (as to those items contested) until the final order has been issued, and the contest rights have lapsed or been exhausted. (See sections D.4. and 5. of this Chapter.) If an employer has been granted an extension of abatement, a Failure to Abate Notice shall not be issued for that violation until the new abatement period has lapsed, and the employer has still failed to abate the violation.

**C.2.k.**

**(3) Calculation of Additional Penalties.** A GBP for unabated violations shall be calculated for failure to abate a serious or other-than-serious violation on the basis of the facts noted upon reinspection. This recalculated GBP, however, shall not be less than that assessed for the item when originally cited, except as provided in C.2.k.(5), *Good Faith Effort to Abate*, below.

**(a) Method of Calculation.** In those instances where no penalty was initially proposed, an appropriate penalty shall be determined after consulting with the Compliance Manager. In no case shall the penalty be less than \$1,000 per day. Adjustment factors shall then be applied to arrive at the daily proposed penalty.

**(b)** Only the adjustment factor for size, based upon the circumstances noted during the reinspection, shall then be applied to arrive at the daily proposed penalty.

**(c)** The daily proposed penalty shall be multiplied by the number of calendar days that the unabated violation has continued, except as provided below.

**1** The number of days unabated shall be counted from the day following the abatement date specified in the citation as the final order. It will include all calendar days between that date and the date of reinspection, excluding the date of reinspection.

**2** Normally, the maximum total proposed penalty for failure to abate a particular violation shall not exceed 30 times the amount of the daily proposed penalty.

**3** At the discretion of the Program Director, a lesser penalty may be proposed with the reasons for doing so (e.g., achievement of an appropriate deterrent effect) documented in the case file.

**4** If a penalty in excess of the normal maximum of 30 times the amount of the daily proposed penalty is deemed appropriate by the Program Director, the case shall be treated under the violation-by-violation penalty procedures established.

**(d)** In unusual circumstances such as where the gravity of the violation is at the highest level (high severity and greater probability), or when the employer has willfully failed to abate the violation or has failed to abate a second time, higher penalties shall be proposed. In such situations, the

proposed penalty and factors involved shall be developed in consultation with the Director of VOSH Programs and the Director of the Office of Legal Support and approved by the Commissioner.

**C.2.k.**

**(4) Partial Abatement.**

**(a) Partial Reduction.** When the violation has been partially abated, the Compliance Manager may authorize the CSHO to incorporate a reduction of 25% to 75% to the amount of the assessed penalty calculated as outlined in part (2), above. The reasons for this action shall be documented in the case file.

**(b) Only Some Instances Corrected.** When a violation consists of a number of instances and the follow-up inspection reveals that only some instances of the violation have been corrected, the additional assessed penalty shall take into consideration the extent to which the violation has been abated.

**EXAMPLE:** Where three out of five instances have been corrected, the assessed penalty (calculated as outlined in part (2) above, without regard to any partial abatement) may be reduced by 60%.

**(c) Substantive Requirements.** In multi-step correction items, only the failure to comply with substantive (rather than procedural) requirements shall generally incur a failure to abate penalty.

**(d) Procedural Requirements.** On rare occasions, when the Department decides to issue a Failure to Abate Notice for failure to comply with procedural requirements, the calculation of the assessed penalty shall consider the extent to which a violation has been substantially abated, with the daily assessed penalty (calculated as outlined in above, without regard to any partial abatement) reduced accordingly.

**(5) Good Faith Effort to Abate.** When the CSHO believes, and so documents in the case file, that the employer has made a good faith effort to correct the violation and the employer had good reason to believe that it was fully abated, the CSHO may reduce or eliminate the assessed penalty that would otherwise be justified.

**I. Repeat Violations.** Section 40.1-49.4.J., *Code of Virginia*, provides that an employer who repeatedly violates VOSH requirements may be assessed a civil penalty of not more than \$70,000 for each violation.

The VOSH *Administrative Regulations Manual* defines a repeated violation as "... a violation deemed to exist in a place of employment that is substantially similar to a previous violation of a law, standard or regulation that was the subject of a prior final order against the same employer. A repeated violation results from an inadvertent or accidental act, since a violation otherwise repeated would be willful."

Repeat violations may be cited for a period of three years following the issuance of a final order which cites any violation of standard, regulation or statute. If a repeat violation directly contributes to a fatality, a penalty of \$70,000 shall be assessed.

#### C.2.I.

- (1) **Gravity-Based Penalty Factors.** Each violation shall be classified as serious or other-than-serious. A GBP shall then be calculated for repeated violations based on facts noted during the current inspection. Only the adjustment factors for size appropriate to the facts at the time of the inspection shall be applied.
- (2) **Penalty Increase Factors.** The amount of the increased penalty to be assessed for a repeated violation shall be determined by the size of the employer.
  - (a) **Smaller Employers.** For employers with 250 or fewer employees, the GBP shall be doubled for the first repeated violation and quintupled if the violations have been cited twice before. If the Program Director determines that it is appropriate to achieve the necessary deterrent effect, the GBP may be multiplied by 10.
  - (b) **Larger Employers.** For employers with more than 250 employees, the GBP shall be multiplied by 5 for the first repeated violation and multiplied by 10 for the second repeated violation.
- (3) **Other-than-Serious Violations with No Initial Penalty.** For a repeated other-than-serious violation that had no initial penalty, if a decision is made to penalize, a GBP of \$200 shall be assessed for the first repeated violation, \$500 if the violation has been cited twice before, and \$1,000 for a third repetition.
- (4) **Regulatory Violations.** For repeated regulatory violations, the initial penalty shall be doubled for the first repeated violation and quintupled if the violation has been cited twice before. If the Commissioner determines that it is appropriate to apply a deterrent effect, the initial penalty may be multiplied by 10.

#### C.2.

- m. **Willful Violations.** Section 40.1-49.4.J., *Code of Virginia*, provides that an employer who willfully violates VOSH requirements may be assessed a civil penalty of not more than \$70,000 but not less than \$5,000 for each violation. If a willful violation directly contributes to a fatality, a penalty of \$70,000 shall be assessed.

- (1) **Gravity-Based Penalty Factors.** Each violation shall be classified as serious or other-than-serious. After determining the gravity of the violation, a GBP shall be determined based on the facts noted during the inspection.
- (a) The CSHO will determine the gravity of the violation based upon: 1) the severity of the injury or illness which could result from the alleged violation, and 2) the probability that an injury or illness could occur as a result of the alleged violation.
  - (b) For willful violations, a severity of high, medium or low shall be assigned and a probability of actual, greater or lesser is also assigned. “Actual” has been added as a probability factor. This factor shall be used if an employee(s) suffers an injury or illness as a result of a violation.
  - (c) Once the gravity of the violation is determined, the penalty will be adjusted for size and history. A maximum penalty reduction of 60% is permitted for size. The adjustment factor for history shall be given to all employees who have not been cited by VOSH for any serious willful or repeated violations in the past three years. A reduction of 10% shall be given.

*NOTE: For a willful violation, no penalty reduction will be permitted on the basis of good faith, and no penalty reduction will be permitted where there has been a fatality.*

**EXAMPLE:** A CSHO inspects the trenching site of Employer X. Employer X has 15 employees. A review of the employer’s history shows that the employer has been cited for serious violations within the past three years. The CSHO categorizes the trenching violation as medium severity and greater probability. The CSHO then determines that Employer X is entitled to a 60% reduction for size (fewer than 25 employees) and no reduction for history: therefore, the total penalty reduction is 60%.

Go to the following table. Look for the severity and probability factors which you have assigned to the violation. A willful violation categorized as medium severity/greater probability with a penalty reduction of 60% results in a proposed penalty of \$14,000.

**In no case shall a proposed penalty for a willful violation be less than \$5,000.**

**The proposed penalty shall be determined from the following table.**



## PENALTIES FOR WILLFUL VIOLATION(S)

### PENALTY REDUCTIONS

| SEVERITY | PROBABILITY         | 0%     | 10%    | 20%    | 30%    | 40%    | 50%    | 60%    | 70%    |
|----------|---------------------|--------|--------|--------|--------|--------|--------|--------|--------|
| High     | Actual (fatality)   | 70,000 | N/A    | N/A    | N/A    | N/A    | N/A    | N/A    | N/A    |
|          | Actual (injury/cat) | 63,000 | 56,700 | 50,400 | 44,100 | 37,800 | 31,500 | 25,200 | 18,900 |
|          | Greater             | 50,000 | 45,000 | 40,000 | 35,000 | 30,000 | 25,000 | 20,000 | 15,000 |
|          | Lesser              | 25,000 | 22,500 | 20,000 | 17,500 | 15,000 | 12,500 | 10,000 | 7,500  |
| Medium   | Actual (injury)     | 60,000 | 54,000 | 48,000 | 42,000 | 36,000 | 30,000 | 24,000 | 18,000 |
|          | Greater             | 35,000 | 31,500 | 28,000 | 24,500 | 21,000 | 17,500 | 14,000 | 10,500 |
|          | Lesser              | 20,000 | 18,000 | 16,000 | 14,000 | 12,000 | 10,000 | 8,000  | 6,000  |
| Low      | Actual (injury)     | 55,000 | 49,500 | 44,000 | 38,500 | 33,000 | 27,500 | 22,000 | 16,500 |
|          | Greater             | 25,000 | 22,500 | 20,000 | 17,500 | 15,000 | 12,500 | 10,000 | 7,500  |
|          | Lesser              | 15,000 | 13,500 | 12,000 | 10,500 | 9,000  | 7,500  | 6,000  | 5,000  |

The proposed penalty for any willful violation shall not be less than \$5000.

No penalty reduction factors may be applied to any violation which directly contributed to a fatality. Such a willful violation shall be penalized at \$70,000.

### Gravity of the Violation

**Severity** of the injury/illness:

- High: death from injury/illness; injuries involving permanent disability; or chronic, irreversible illnesses
- Medium: injuries or temporary reversible illnesses resulting in hospitalization, substantial outpatient care of a variable but limited period of disability
- Low: Injuries or temporary, reversible illnesses not resulting in hospitalization and requiring only minor supportive treatment (limited outpatient care)

**Probability** that an injury/illness could occur :

- Actual: death, actual injury or illness
- Greater: likelihood that an injury or illness will occur is judged to be relatively high
- Lesser: likelihood that an injury or illness will occur is judged to be relatively low

### Penalty Reduction Factors

**Size (number of employees):**

- 1-25 60% reduction
- 26-100 40% reduction
- 101-250 20% reduction
- 251 or more None

**History:**

A 10% reduction for history shall be given to employers who have not been cited by VOSH for any serious, willful or repeat violations in the last three years.

**C.2.m.**

- (2) Regulatory Violations.** Sections 40 through 60 of the *Administrative Regulations Manual* provide that an employer who violates any of the posting or recordkeeping requirements (other-than-serious violation) may be assessed a civil penalty of up to \$7,000 for each violation.
- (3) Egregious Violations.** For flagrant cases involving willful violations, an egregious (i.e., violation-by-violation) penalty procedure may be considered. Under this procedure, standard penalty calculations described in section C. are applied, but instead of grouping or combining violations for penalty purposes, *each* instance of noncompliance is considered to be a separate violation and a separate penalty is applied. CSHOs who identify a case which could have egregious violations shall notify the Compliance Manager as soon as possible. Only the Commissioner may authorize the use of this policy and approve the assessment of egregious penalties.

**n. General Application.** The procedures that follow shall be used in determining proposed penalties for violations of VOSH regulatory requirements contained in the *Administrative Regulations Manual*, only when the employer has received a copy of the OSHA 300 Form through the Recordkeeping Requirements booklet or from any other source, or had knowledge of the requirements.

- (1)** If the employer has not received the booklet or the OSHA 300 Form, and did not have knowledge, citations without proposed penalties will be issued.
- (2)** Except as otherwise noted, penalties for regulatory violations shall have adjustment factors for size and history applied in determining the proposed penalty.

**o. Posting Requirements.** Penalties for violation of posting requirements shall be proposed as follows:

- (1) VOSH Notice.** If the employer has not displayed (posted) the notice furnished by the Virginia Occupational Safety and Health Program (or OSHA) as prescribed in § 40 of the *Administrative Regulations Manual*, an other-than-serious citation shall normally be issued. The unadjusted penalty for this alleged violation shall be \$1,000.
- (2) Annual Summary.** If an employer fails to post the summary portion of the OSHA-300 Form or acceptable substitute under § 60 of the *Administrative Regulations Manual* during the month of February, as required by § 40 of the *Administrative Regulations Manual*, even if there have been no injuries, an other-than-serious citation shall be issued with an unadjusted penalty of \$1,000.

**C.2.o.**

- (3) Citation.** If an employer received a citation which has not been posted as prescribed in § 40 of the *Administrative Regulations Manual*, an other-than-serious citation shall be issued. The unadjusted penalty shall be \$3,000.

- p. Reporting and Recordkeeping Requirements.** Section 40.1-49.4.G., *Code of Virginia*, provides that violations of the recordkeeping and reporting requirements may be assessed civil penalties of up to \$7,000 for each violation.

- (1) OSHA-300 Form or Acceptable Substitute.** If the employer does not maintain the Log and Summary of Occupational Injuries and Illnesses, the OSHA-300 Form, as prescribed in § 60 of the *Administrative Regulations Manual*, an other-than-serious citation shall be issued. There shall be an unadjusted penalty of \$1,000 for each year the form was not maintained.

- (a) No Recordable Injuries or Illnesses.** When no recordable injuries or illnesses have occurred at a workplace during the current calendar year, the OSHA-300 need not be completed until the end of the calendar year for certification of the summary.

- (b) Significant Recordkeeping Deficiencies.** An OSHA-300 with significant deficiencies shall be considered as “not maintained”.

- (2) OSHA-301 FORM.** If the employer does not maintain the Supplementary Record, OSHA-301 Form (or equivalent), as prescribed in § 60 of the *Administrative Regulations Manual*, an other-than-serious citation shall be issued. There shall be an adjusted penalty of \$1,000 for each OSHA-301 form not maintained.

- (a)** A penalty of \$1,000 shall be assessed for each OSHA-301 form not maintained up to a maximum of \$7,000.

- (b)** A penalty of \$1,000 shall be assessed for each OSHA-301 form inaccurately maintained, up to a maximum of \$3,000.

- (c)** Minor inaccuracies shall be cited, but with no penalties.

- (d)** If a large number of violations or other circumstances indicate that the violations are willful, then other penalties, including violation-by-violation may be applied.

- (3) Reporting.** Employers are required to report, either orally or in writing, to the nearest Regional Office within eight (8) hours of any occurrence of an employment accident which is classified as a

fatality or catastrophe. (See ARM § 50 and § 40.1-51.1.D. *Code of Virginia*.) A penalty of \$5,000 shall be assessed. No adjustments shall be applied.

- (a) An other-than-serious citation shall be issued for failure to report such an occurrence. The unadjusted penalty shall be \$5,000.
  - (b) If the Program Director determines that it is appropriate to achieve the necessary deterrent effect, an unadjusted penalty of \$7,000 may be assessed.
  - (c) If the Compliance Manager becomes aware of an incident required to be reported through some means other than an employer report prior to the elapse of the 8-hour reporting period and an inspection of the incident is made, a citable violation for failure to report does not exist.
- q. **Grouping.** Violations of the posting and recordkeeping requirements which involve the same document (e.g., summary portion of the OSHA-300 Form was neither posted nor maintained) shall be grouped as an other-than-serious violation for penalty purposes. The unadjusted penalty for the group violations would then take on the highest dollar value of the individual items, which would normally be \$1,000.
- r. **Access to Records.** The *Administrative Regulations Manual* requires an employer to maintain forms and records and provide them for inspection and copying by an authorized representative of the Commissioner or by an employee, former employee or authorized representative of employees. (See *Administrative Regulations Manual*, §§ 60 and 80).
- s. **Notification Requirements.** An employer who has received advance notice of an inspection, as required by § 40 of the *Administration Regulations Manual*, must notify the authorized employee representative.

When an employer has received advance notice of an inspection and fails to notify the authorized employee representative as required by § 230 of the *Administrative Regulations Manual*, an other-than-serious citation shall be issued with an unadjusted penalty for \$2,000.

**EXAMPLE:** Employer with 50 employees cited for a serious violation that is categorized as medium severity-lesser probability for a GBP of \$2,000. Reductions of 40% for size and 15% for a documented safety program with no reduction for history for a total reduction of 55%. The proposed penalty is \$900.

\* Starred figures represent penalty amounts that would not normally be proposed for high gravity serious violations because no adjustment for good faith is made in such cases. They may occasionally be applicable for other-than-serious violations where the Compliance Manager has determined a high unadjusted penalty amount to be warranted.

\*\* Administratively, VOSH will not issue a penalty of less than \$100.

### PENALTY TABLE

| Percent Reduction | PENALTY (in dollars) |       |       |       |       |       |        |        |
|-------------------|----------------------|-------|-------|-------|-------|-------|--------|--------|
| GBP               | 1,000                | 1,500 | 2,000 | 2,500 | 3,000 | 3,500 | 5,000  | 7,000  |
| 10                | 900                  | 1,350 | 1,800 | 2,250 | 2,700 | 3,150 | 4,500  | 6,300  |
| 15                | 850                  | 1,275 | 1,700 | 2,125 | 2,550 | 2,975 | 4,250* | 5,950* |
| 20                | 800                  | 1,200 | 1,600 | 2,000 | 2,400 | 2,800 | 4,000  | 5,600  |
| 25                | 750                  | 1,125 | 1,500 | 1,875 | 2,250 | 2,625 | 3,750* | 5,250* |
| 30                | 700                  | 1,050 | 1,400 | 1,750 | 2,100 | 2,450 | 3,500  | 4,900  |
| 35                | 650                  | 975   | 1,300 | 1,625 | 1,950 | 2,275 | 3,250* | 4,550* |
| 40                | 600                  | 900   | 1,200 | 1,500 | 1,800 | 2,100 | 3,000  | 4,200  |
| 45                | 550                  | 825   | 1,100 | 1,375 | 1,650 | 1,925 | 2,750* | 3,850* |
| 50                | 500                  | 750   | 1,000 | 1,250 | 1,500 | 1,750 | 2,500  | 3,500  |
| 55                | 450                  | 675   | 900   | 1,125 | 1,350 | 1,575 | 2,250* | 3,150* |
| 60                | 400                  | 600   | 800   | 1,000 | 1,200 | 1,400 | 2,000  | 2,800  |
| 65                | 350                  | 525   | 700   | 875   | 1,050 | 1,225 | 1,750* | 2,450* |
| 70                | 300                  | 450   | 600   | 750   | 900   | 1,050 | 1,500  | 2,100  |
| 75                | 250                  | 375   | 500   | 625   | 750   | 875   | 1,250* | 1,750* |
| 85                | 150                  | 225   | 300   | 375   | 450   | 525   | 750*   | 1,050* |
| 95                | 100**                | 100** | 100   | 125   | 150   | 175   | 250*   | 350*   |

C. 3. **Criminal Penalties.**

a. **Code of Virginia Provisions.** The *Code of Virginia* provides for criminal penalties in the following cases:

- (1) Willful violations of a VOSH standard, rule of order causing death of an employee. (§ 40.1-49.4.K.)
- (2) Giving unauthorized advance notice. (§ 40.1-51.3:1)
- (3) Giving false information. (§ 40.1-51.4:2)
- (4) Refusal to answer questions; obstruction of inspections. (§ 40.1-10)

b. **Imposed by Courts.** Criminal penalties are imposed by the courts after trials and not by VOSH.

4. **Egregious Penalties.**

a. **Purpose.** Large proposed penalties, e.g., where penalties are proposed on a violation-by-violation basis, and criteria guiding approval of such penalties by the Commissioner, are based on meeting the public purpose.

b. **Guidance.**

(1) **Early Identification of Cases.** It is important that the Compliance Manager identify, as early as possible, cases which may be appropriate for violation-by-violation treatment.

(a) Careful documentation of evidence for each violation and appropriate involvement of technical specialists required for litigation is essential to the successful pursuit of potential egregious cases.

(b) Coordination with the Central Office must be scheduled in time for comprehensive review before the expiration of the statutory 6-month citation period.

(c) Early involvement of the Office of Legal Support will ensure adequate legal, evidentiary, and resource coordination.

(2) **Criteria.** Those conditions which constitute a flagrant violation of the law or of VOSH standards/regulations are appropriate for violation-by-violation handling. The following criteria shall be used by the Compliance Manager to determine whether to recommend the use of violation-by-violation citations and penalties:

**C.4.b.(2)**

**(a)** Cases must be classified as willful.

- 1** The employer is found in violation of a VOSH requirement:
  - a** Of which he has actual knowledge at the time of the violation. Such knowledge may be demonstrated through previous citation history, accident experience, widely publicized agency compliance, direct evidence of specific recognized jobsite hazards or other appropriate factors; and
  - b** Intentionally, through conscious, voluntary action or inaction, having made no reasonable effort to eliminate the known violation.

**(b)** Cases must fall in at least one of the categories given in the following list, 1 through 6.

- 1** The violations resulted in worker fatalities, a worksite catastrophe, or a large number of injuries or illnesses.
- 2** The violations resulted in persistently high rates of worker injuries or illnesses.
- 3** The employer has an extensive history of prior violations of VOSH law.
- 4** The employer has intentionally disregarded safety and health responsibilities.
- 5** The employer's conduct taken as a whole amounts to clear bad faith in the performance of his duties under the law.
- 6** The employer has committed a large number of violations so as to undermine significantly the effectiveness of any safety and health program that might be in place.

**(c)** Cases which satisfy only one of the two main criteria, above, are not suitable for violation-by-violation penalties. For example, an employer who has an extensive history for the case in question may not be subject to egregious penalties.

(3) **Case Support Requirements.** Because these cases involve administrative and legal issues critical to effective compliance with the law, it is essential to ensure that the highest professional standards are met in the conduct of inspections, the issuance of citations and the prosecution of litigation in such cases.

(a) **Documentation.** Whenever a case is proposed for violation-by-violation treatment, fully detailed written responses to the questions in the appendix must be developed. Supporting documentation shall be provided and cross-referenced whenever possible. Mandatory use of these questions is intended to provide a consistent format to aid in review of these cases, as well as to ensure as much as possible uniformity of case development across the state.

(b) **Evidence.** Documentary support shall ordinarily be planned for and obtained early in the investigation.

1 The evidence necessary to support citations being considered for violation-by-violation penalty sanctions shall be included in the case file. Such evidence must be present for each separate violation.

a Photographs, videotapes, audiotapes, sampling data, and witness statements shall be used whenever possible to provide supporting evidence of violative conditions.

b Company documents supporting knowledge of that standard and the violative conditions as well as willfulness of the violation shall be diligently sought and obtained by interrogatories as appropriate.

c Examples of such documents are internal audit reports, consultant or insurance company reports, trade association articles, minutes from safety meetings, complaints from employees, memoranda and other correspondence from safety personnel, especially from plant (or site) safety to plant (or site) management. Also included might be recognition by corporate safety personnel of violations and bringing these violations to the attention of higher management, notes relating to VOSH activities, and industry practice in other companies or industries.



**C.4.b.(3)(b)**

- 2** Employers must be asked explicitly:

    - a** If and when they recognized the hazardous nature of each of the violations;
    - b** If they knew what VOSH's standards require and, if so, what steps the company had taken to abate the violations and why the apparent violations had not been corrected;
    - c** Whether they knew of the documents identified under subparagraph (1), above, and what those documents contained.
  - 3** Their response shall be carefully documented in writing (verbatim, if possible). An attempt shall be made to have a second person present as a witness, particularly when dealing with potentially compromising matters.
  - 4** Signed employee statements shall be obtained routinely to support each of these violations in as much detail as possible.
  - 5** Employee exposure and the nature and extent of injuries or illnesses related to the violations shall be carefully and adequately described.
  - 6** The need for interrogatories and medical access orders shall be decided and documents obtained as soon as possible.
  - 7** The need for experts shall also be decided and necessary arrangements made as soon as possible. It is anticipated that experts will be needed for cases involving complex violations, such as ergonomics or abatement methods.
  - 8** Particular attention shall be paid to anticipating and preparing for possible employer defenses in accordance with the guidelines in this FOM.
- (c) The Office of Legal Support Involvement.** Early involvement of the Office of Legal Support is essential to examine and evaluate the documentation and other evidence supporting the violations and to determine

whether expert witnesses or depositions will be necessary, as well as to provide sufficient time for the Office of Legal Support to write an opinion on the merits of the case.

**C.4.b.**

- (4) Citations.** The law authorizes penalties to be proposed for each violation but limits the maximum penalty that can be proposed. In accordance with the guidelines, the following procedures shall be adhered to in issuing citations with violation-by-violation penalties.

  - (a)** Each separate violation must have its own Alleged Violation Description which will describe the particular conditions associated with that violation instance.
  - (b)** Each separate violation must have its own penalty calculated in accordance with the procedures given in this Chapter.
- (5) Case Review.** The procedures and timetables for significant case review will be followed in all cases involving violation-by-violation citations.

  - (a)** The Compliance Manager shall notify the Program Director of a potential egregious case. The Program Director shall, in turn, notify the Commissioner of the following:

    - 1 Establishment name.
    - 2 Regional Office of jurisdiction.
    - 3 Six-month date.
    - 4 Opening conference date.
    - 5 General type of apparent violations (e.g., safety, health, recordkeeping).
  - (b)** Compliance Manager(s) shall take care not to expand the inspection beyond what they can reasonably expect to accomplish within these time frames.
  - (c)** The Program Director shall coordinate the provision of needed technical support and expert witnesses and may request assistance from federal OSHA, if necessary.
  - (d)** The Compliance Manager shall complete his part of the significant case review as soon as possible, but not later than 45 days prior to the 6-month date, and forward the case file to the Program Director for review.

- C.4.b. (6) Recordkeeping Violations.** If the case involves recordkeeping violations which are being considered for additional penalties, further steps are necessary.
- (a)** Copies of evidence supporting each recordkeeping violation proposed as egregious, as developed from the company's occupational injury and illness logs and supplementary records, worker's compensation records, medical records, first aid logs and other sources shall be included in the package. (See guidelines in Appendix.)
  - (b)** This evidence must support the existence of a violation for both non-recorded and mis-recorded cases. It must include the particular recordability criteria involved: whether the case involved days away from work or days of restricted work activity beyond the day of injury or onset of illness as well as evidence that the case was work-related.

*NOTE: Medical records contained in the case file shall be handled in accordance with the guidelines.*

## **D. POST-CITATION PROCESSES.**

### **1. Informal Conferences.**

- a. General.** Pursuant to § 330 of the *Administrative Regulations Manual*, the employer, any affected employee or the employee representative may request an informal conference.
  - b. Procedures.** Whenever an informal conference is requested by the employer, an affected employee or the employee representative, both parties shall be afforded the opportunity to participate fully. If the requesting party objects to the attendance of the other party, separate informal conferences may be held. During the conduct of a joint informal conference, separate or private discussions may be permitted if either party so requests.
- (1) Notification of Participants - Employer Requested Informal Conference.** After an informal conference requested by an employer has been scheduled, it is the duty of the employer to notify the employees of the issues involved, and the date, time and place of the informal conference in accordance with § 330 E. of the *VOSH Administrative Regulations Manual*.
  - (2) Notification of Participants - Employee Requested Informal Conference.** After an informal conference requested by an employee has been scheduled, the Regional Director shall notify the affected parties of the date, time and place by telephonic

or electronic means, and, if considered useful, in writing in accordance with § 330 E. of the *VOSH Administrative Regulations Manual*.

**D.1.b.(2)**

- (a)** The employer shall be requested to complete and post the form provided in the citation package.
- (b)** Documentation of the Regional Director's actions notifying the parties of the informal conference shall be placed in the case file.

**c. Participation by VOSH Officials.** The inspecting CSHO(s) shall be notified of an upcoming informal conference and, if feasible, shall be given the opportunity to participate in the informal conference (unless the Regional Director anticipates that only a penalty adjustment will result). They shall be advised of any changes made by the Regional Director in the event they were unable to participate.

- (1)** In complex cases, in order to ensure that discussions of, and possible settlement or modifications to, the citation(s) or penalty may be completely and accurately recalled, at least, one other VOSH employee (in addition to the Regional Director) may be present at the informal conference. This employee may be the CSHO, a clerical staff member, or other assigned person.
- (2)** A second VOSH staff member (compliance officer or other assigned person) should attend all informal conferences in the following situations:
  - (a)** Cases which involve total proposed penalties of \$100,000 or more;
  - (b)** Cases which are so lengthy or complex that an additional individual is needed to provide assistance to the principal VOSH representative.
- (3)** The Regional Director shall ensure that notes are made indicating the basis for any decisions made at, or as a result of, the informal conference. It is appropriate to tape record the informal conference and to use the tape recording in lieu of written notes, but the tape recording should not be used as a substitute for the second VOSH conference participant cited in the above paragraph.

**d. Conduct of the Informal Conference.** The Regional Director shall normally conduct the informal conference. The following guidelines shall be used.

- (1) Opening Remarks.** The opening remarks shall include discussions of the following:

**D.1.d.(1)**

- (a)** Purpose of the informal conference.
- (b)** Rights of participants.
- (c)** Contest rights and time restraints.
- (d)** Limitations, if any.
- (e)** Settlement of cases.
- (f)** Other relevant information.

**(2) Conference.** The conference shall include discussion of any relevant matters including citations, safety and health programs, conduct of the inspection, means of correction and penalties in accordance with the following:

- (a)** All parties shall be encouraged to participate fully so their views can be properly considered.
- (b)** Positions on all issues discussed shall be fully considered before making a determination regarding possible settlement of the case in accordance with current VOSH procedures.
- (c)** VOSH representatives shall make every effort to assist both the employer and the affected employees and their representatives to improve safety and health in the workplace.

**(3) Closing.** At the conclusion of the discussion, the main issues and potential courses of action shall be summarized. A written summary of the informal conference shall be compiled. This summary, together with any other relevant notes or tapes of the discussions that are made by the Regional Director, shall be placed in the case file.

**e. Decisions.** At the end of the informal conference, unless it involves a significant case, the Regional Director shall make a decision as to what action is appropriate in light of facts brought up during the conference.

- (1)** When preparing to make a decision to settle a case, the Regional Director shall make a reasonable effort to obtain the views of the employee representative, if there is one, and if he did not attend the conference. There is no need to contact the employee representative if only a penalty adjustment is involved.
- (2)** Changes to citations, penalties, or abatement dates normally shall be made by a means of an informal settlement agreement in accordance with current VOSH procedures. The reasons for such changes shall be documented in the case file.

**D.1.e.**

- (3)** Employers shall be informed that they are required by § 330 F. of the *Administrative Regulations Manual* to post copies of all amendments to the citation resulting from informal conferences.
- (4)** Affected parties shall be notified of the results and decisions of the informal conference in accordance with current VOSH procedures. They shall be informed of VOSH policy granting them the right to appeal, informally, to the Program Director, any decision with which they disagree.
- (5)** The CSHOs who conducted the inspection and the Compliance Managers shall be informed of the results and decisions of informal settlement agreements and amended citations.
- (6)** For more detail on settlement agreements, refer to D.4.

**f. Failure to Abate.** If the informal conference involves an alleged failure to abate, the Regional Director and/or the Compliance Manager may set a new abatement date in the informal settlement agreement, documenting for the case file the time that has passed since the original citation, the steps that the employer has taken to inform the exposed employees of the risk and to protect them from the hazard, and the measures that will have to be taken to correct the condition.

- (1)** Once a new abatement date has been set, a modification of abatement date shall be entered into the data system following current IMIS procedures.
- (2)** A letter shall be sent to the employer reminding him in the strongest possible terms that abatement is legally required if no written notice of contest is submitted within the contest period for the Notification of Failure to Abate Alleged Violations.
- (3)** The employer shall also be reminded that if there is any problem in meeting the new abatement date after it becomes a final order, a written request for extension of abatement date must be filed with the Compliance Manager in accordance with guidelines.

**2. Petitions for Modification of Abatement Date – Extension of Abatement Time.** Section 320 of the *Administrative Regulations Manual* governs the disposition of petitions for extensions of abatement time. If the employer requests additional time after the 15 working-day contest period has passed, the following procedures are to be observed:

- a. Filing Date.** A written petition for extension of abatement time must be mailed to, or received by, the Compliance Manager who issued the citation no later than the close of business on the date which abatement was originally required.

**D.2.a.**

- (1) If a request is submitted orally, the employer shall be informed that VOSH cannot accept an oral request and that a written petition must be mailed by the end of the next working day after the abatement date. If there is not sufficient time to file a written petition, the employer shall be informed of the requirements as listed in § 320 of the *Administrative Regulations Manual*.
- (2) A late petition may be accepted only if accompanied by the employer's statement of exceptional circumstances explaining the delay.

**b. Failure to Meet All Requirements.** If the employer's letter does not meet all the requirements, a letter spelling out these requirements and identifying the missing elements shall be sent to the employer within 10 working days, specifying a reasonable amount of time for the employer to return the completed petition.

- (1) If no response is received or if the information returned is still insufficient, a second attempt (by telephone or in writing) shall be made. The employer shall be informed of the consequences of a failure to respond adequately; namely that the petition will not be granted and that the employer may consequently be found in failure to abate upon a follow-up inspection.
- (2) If the employer responds satisfactorily by telephone and if the Compliance Manager determines that the requirements for the petition have been met, appropriate documentation shall be placed in the case file.

**c. Delayed Decisions.** Although VOSH policy is to handle petitions for extension of abatement as quickly as possible, there are some cases where the Regional Director's decision on the petition is delayed because of inadequacies in the petition itself, a decision to conduct a monitoring inspection or the need for the Commissioner's involvement. A letter conveying the need for further time shall be sent to the employer and the employee representatives.

**d. Position on PMA (Petition for Modification of Abatement).**

- (1) **When a Petition is Anticipated.** Whenever a citation for engineering controls or other violation which the Compliance Manager believes can be reasonably expected to give rise to a future petition for extension of abatement time, the following procedures shall apply:
  - (a) A follow-up date 45 days prior to the final abatement date shall be entered into the information retrieval system used by the Regional Office. When that follow-up date arrives, the file shall be pulled and reviewed by the Compliance Manager and the CSHO involved.

**D.2.d.(1)**

- (b) After review, the Compliance Manager shall contact the employer to determine abatement progress. Information on the status of abatement shall be obtained and documented in the case file. The potential need for additional time shall be discussed with the employer. If the employer indicates that more time will be necessary to complete correction of the citations, this need shall be documented and the procedures for seeking an extension shall be explained.

**(2) Requirements for a Petition.** If a letter is received from an employer requesting a modification of an abatement date, the Compliance Manager shall ensure that the following five requirements (refer to § 320.C. of the *Administrative Regulations Manual*) are set forth in sufficient detail in the employer's petition:

- (a) All steps taken by the employer and the dates of such action in an effort to achieve compliance during the prescribed abatement period.
- (b) The specific additional abatement time necessary to achieve compliance.
- (c) The reasons such additional time is necessary, including the unavailability of professional or technical personnel or of materials and equipment, or because necessary construction or alteration of facilities cannot be completed by the original abatement date.
- (d) Interim steps being taken to safeguard the employees against the cited hazard during the abatement period.
- (e) A certification that a copy of the petition has been posted in a conspicuous place near the location where the violation occurred or where all affected employees will have notice thereof. The petition shall remain posted for 10 working days and shall be served on the authorized representative of affected employees, if there is one. Such certification shall include the date on which posting and service was made.

**(3) Processing the Petition for Extension.** After 15 working days following certification of the petition posting, the Compliance Manager shall determine VOSH's position, agreeing with, or objecting to, the petition. This shall be done within 10 working days following the 15 days (if additional time has not been requested from the Commissioner). The following action shall be taken:



**D.2.d.(3)**

- (a)** If the request is six months or less from the issuance date of the citation, the Compliance Manager has the authority to approve or object to the petition.
- (b)** Any petition requesting an abatement date which is more than six months and up to and including one year from the issuance date of the citation requires the approval of the Program Director.
- (c)** Any petition requesting an abatement date which is more than one year from the issuance date of the citation requires the approval of the Commissioner.
- (d)** If the petition is approved, the Compliance Manager shall notify the employer and the employee representatives by letter.
- (e)** If, after a second contact with the employer, the information required continues to be substantially insufficient, the Compliance Manager shall contact the Program Director who, after consultation with the Commissioner, shall object to the petition.
- (f)** If supporting evidence justifies it (e.g., employer has taken no meaningful abatement action at all or has otherwise exhibited bad faith), the Compliance Manager, the Program Director or the Commissioner, as appropriate, shall object to the petition.
  - 1** Both the employer and the employee representatives shall be notified on the date the decision is made by letter with return receipt requested.
  - 2** When appropriate, a failure to abate notification may be issued in conjunction with the objection to the extension request.

**e. Employee Objections.** Affected employees or their representatives may file an objection in writing to an employer's petition with the Compliance Manager within 10 working days of the date of posting of the petition by the employer or its service upon an authorized employee representative.

- (1)** Failure to file such a written objection within the 10 working-day period constitutes a waiver of any further right to object to the petition.

**D.2.e.**

- (2)** If an employee or an employee representative objects to the extension of the abatement date, the appropriate VOSH official, as set out in the guidelines, shall hold an informal conference to try to resolve the issue (see this chapter for procedures to be followed). If settlement is not made through the informal conference or does not appear probable, the matter will be set for a hearing by the Commissioner under § 9-6.14:11, *Code of Virginia*. (See § 320 of the *Administrative Regulations Manual*.)

**f. Appeals of Adverse Decisions.** The employer or an affected employee or employee representative may seek review of an adverse decision regarding the petition for extension of abatement by mailing a written request to the Commissioner within five working days of receipt of the decision. The Commissioner will hear the appeal using the procedures of § 9-6.14:11, *Code of Virginia*.

**g. Abatement Efforts.** The Compliance Manager shall take the steps necessary to ensure that the employer is making a good faith attempt to bring about abatement as expeditiously as possible.

- (1)** Where engineering controls have been cited or required for abatement, a monitoring inspection shall normally be scheduled to evaluate the employer's abatement efforts. Failure to conduct a monitoring inspection shall be fully explained in the case file.
- (2)** Where no engineering controls have been cited but more time is needed for other reasons not requiring assistance from VOSH such as delays in receiving equipment, a monitoring visit need not normally be scheduled.
- (3)** Monitoring inspections shall be scheduled as soon as possible after the initial contact with the employer rather than be delayed until actual receipt of the extension petition.
- (4)** The CSHO shall decide during the monitoring inspection whether sampling is necessary and, if so, to what extent; i.e., spot sampling, short-term sampling, or full-shift sampling.
- (5)** The CSHO shall include pertinent findings in the narrative along with recommendations for action. To reach a valid conclusion when recommending action, it is important to have all the relevant factors available in an organized manner. The following factors shall be considered:

  - (a)** Progress reports or other indications of the employer's good faith, demonstrating effective use of technical expertise and management skills, accuracy of information reported by the employer and timeliness of progress reports.

**D.2.g.(5)**

- (b)** The employer's assessment of the hazards by means of surveys performed by in-house personnel, consultants or the employer's insurance company.
- (c)** Other documentation collected, including verification of progress reports, success or failure of abatement efforts, and assessment of current exposure levels to employees.
- (d)** Employer and employee interviews.
- (e)** Specific reasons for requesting additional time including specific plans for controlling exposure, and specific calendar dates.
- (f)** Personal protective equipment.
- (g)** Medical programs.
- (h)** Emergency action plans.

*NOTE: Not all these factors will be pertinent in every extension review. Neither are all the factors listed which must be considered in every case.*

**3. Services Available to Employers.** Employers requesting abatement assistance shall be informed that VOSH is willing to work with them even after citations have been issued. In addition, the employer shall be made aware of the availability of VOSH onsite consultation services for which they may qualify. Such services are provided at no charge to the employer. (See related guidelines).

**4. Settlement of Cases.**

- a. General.** Regional Directors are granted settlement authority to make the informal conference a more significant and uniformly used element of the compliance process; to avoid delays in correction of hazards which could result from litigation, and to give VOSH and affected employers and employees a way to resolve conflicts without prolonged litigation.
  - (1)** Regional Directors should send a letter to employers with each set of citations issued. The letter shall notify employers of the opportunity to discuss amendments to citations and proposed penalties during an informal conference and of the Regional Director's authority to make certain appropriate amendments. (Refer to section D.1.b. of this Chapter for additional notification requirements).
  - (2)** Regional Directors are authorized to enter into Informal Settlement Agreements with an employer before the employer files a written notice of contest.

**D.4.a.**

- (3)** For routine cases, the Regional Directors are authorized, as outlined in this chapter, to change abatement dates, to reclassify violations (e.g., serious to other-than-serious), and to modify or withdraw a penalty, a citation or a citation item. The employer must present evidence during the informal conference which convinces the Regional Director that the changes are justified.

  - (a)** Decisions shall be made in accordance with the guidelines given in this chapter.
  - (b)** Reduction in penalties or negotiation of a penalty installment payment plan must be based on evidence of financial hardship presented by the employer. Such evidence could consist of federal/state tax returns, copies of financial statements or other appropriate documents depicting the financial condition of the employer.
  - (c)** Adequate documentation of settlement negotiations and the justification for any changes made shall be placed in the case file.
- (4)** For significant cases and those cases where the Program Director has settlement authority, the Regional Director shall conduct the informal conference to determine what proposed settlement is offered by the employer. The Regional Director shall submit this information to the Program Director who shall make a decision, if the change falls within his settlement authority, or review the proposed settlement and submit it to the Commissioner for final action. *(Refer to VOSH Program Directive 01-004, or its successor, for Director and Managers Responsibilities).*
- (5)** The Regional Director shall negotiate the amount of penalty reduction or a penalty installment payment plan, depending on the circumstances of the case, the financial condition of the employer and what improvements in employee safety and health can be obtained in return.

  - (a)** Improvements in employee safety and health that can be added to settlement agreements include:

    - 1** Written safety procedures addressing the particular hazard;
    - 2** Written training requirements specifying initial training, weekly/monthly safety meetings and annual retraining;
    - 3** Written training records documenting those employees having received training in addition to the subject of the training and date of training;

**D.4.a.(5)(a)**

- 4** Written disciplinary procedures specifying measures to be taken against employees who violate safety and health procedures;
- 5** Written disciplinary records documenting discipline taken against employees for violation of safety and health procedures.

*NOTE: Regional Director(s) may contact the Office of Legal Support to request assistance in drafting settlement agreements containing any of the above safety and health improvements.*

- (6)** Employers shall be informed that they are required by Section 40 and Section 330 of the *Administrative Regulations Manual* to post copies of all amendments or changes resulting from informal conferences. Employee representatives must also be provided with copies of such documents by the employer when the informal conference was at the request of the employer. This regulation covers amended citations, citation withdrawals and settlement agreements. (Refer to section D.1.b. of this Chapter for complete notification requirements).

**b. Pre-Contest Settlement (Informal Settlement Agreement).** Pre-contest settlements generally occur during the informal conference.

- (1)** If a settlement is reached during the informal conference, an Informal Settlement Agreement shall be prepared, and the employer representative shall be invited to sign it. The Informal Settlement Agreement shall be effective upon signature by both the Regional Director and the employer representative. Both shall date the document as of the day of actual signature.
  - (a)** If the employer representative requests more time to consider the agreement and if there is sufficient time remaining of the 15-working day period, the Regional Director shall sign the agreement and provide the signed original for the employer to study while considering whether to sign it.
  - (b)** If the agreement is not prepared during the informal conference, the Regional Director shall provide the original to the employer by certified mail, return receipt requested or in person, if circumstances warrant such action (e.g., an agreement has been reached over the phone, but there is not sufficient mailing time for the employer to sign the agreement and return it to the Regional office before the end of the contest period).

**D.4.b.(1)(b)**

- 1** If the signed agreement is provided to the employer, a copy shall be kept in the case file. The employer shall be informed in writing that no changes are to be made to the original by the employer without explicit prior authorization for such changes from the Regional Director.
- 2** The Regional Director shall also make it very clear that it is the employer's responsibility to sign the agreement prior to the expiration of the contest period.
- 3** In every case, the Regional Director shall inform the employer during the informal conference that the citation will become final and unreviewable at the end of the contest period unless the employer either signs the agreement or files a written notice of contest.
- 4** If the employer representative wishes to make any changes to the text of the agreement, the Regional Director must agree to and authorize the proposed changes prior to the expiration of the contest period.

  - a** If the changes proposed by the employer are acceptable to VOSH, the Regional Director shall authorize the change and work out the exact language to be written into the agreement. The employer shall be instructed to incorporate the agreed-upon language into the agreement, sign it and return it to the Regional Office as soon as possible.
  - b** Annotations, including the exact language of any changes authorized by the Regional Director, shall be made to the file copy of the agreement, and a dated record of the authorization shall be signed by the Regional Director and placed in the case file.
- 5** If the employer's copy of the agreement has not been received in the Regional Office by the close of business on the day before the last day of the contest period, the Regional Director should make every effort to contact the employer to determine his intention.

**D.4.b.(1)(b)5**

- a** The employer shall be reminded that the agreement must have been signed by both parties prior to the expiration date of the contest period if it is to be valid.
    - b** If the employer representative does not wish to sign the agreement, the Regional Director shall point out that the citation will become a final order unless the employer files a timely notice of intent to contest.
  - c** If time is short and if the employer and the Regional Office have telefacsimile equipment, the signed and dated agreement may thereby be transmitted to the Regional Director by the employer.
- 6** Upon receipt of the Informal Settlement Agreement signed by the employer, the Regional Director shall ensure that any modified text of the agreement is in accordance with the notations made in the case file. The Regional Director shall initial and date the changes.
  - a** If so, the citation record shall be updated in IMIS in accordance with current procedures.
  - b** If not, and if the variations substantially change the terms of the agreement, the agreement signed by the employer shall be considered as a notice of intent to contest and shall be handled accordingly. If there is any question as to whether any variation is substantive, the Compliance Manager shall contact the Program Director for guidance.
- 7** If the employer cannot be reached, a reasonable time shall be allowed for return of the agreement from the employer.
  - a** After that time, if the agreement has still not been received, the Regional Director shall presume that the employer is not going to sign the agreement and treat the citation as a final order until such time as the agreement is received.
  - b** The employer shall be required to certify that the Informal Settlement Agreement was signed prior to the expiration of the contest period.

**D.4.b.(1)**

**(c)** In any case where the Regional Director provides an employer with a signed original of the proposed agreement, the Informal Settlement Agreement is effective the moment the employer representative signs it as long as the contest period has not expired.

**(2)** If the citation is amended as a result of the informal conference, the amended citation shall include the following or similar language:

**This Citation has been Amended by Agreement between the Commissioner and the Employer named above. As part of the written agreement, the employer has waived his right to file a Notice of Contest to this order. This agreement shall not be construed as an admission by the Employer of civil liability for any violation alleged by the Commissioner. This agreement may be used for future compliance purposes pursuant to Title 40.1 of the Code of Virginia. (See Appendix.)**

**(3)** If the Regional Director's settlement efforts are unsuccessful and the employer contests the citation, the Regional Director shall state the terms of the final settlement offer in a memorandum to the Program Director and to the Office of Legal Support.

**c. Procedures for Preparing the Informal Settlement Agreement.**

VOSH will prepare and process informal settlement agreements as closely to the provisions of § 340 of the *Administrative Regulations Manual* as possible.

**d. Post-Contest Settlement (Informal Settlement Agreement).** Post-contest settlements will generally occur before the bill of complaint is filed with the court. The time limits are goals for internal use only. If time limits need to be extended, approval for an extension shall be obtained from the next person in the supervisory chain (e.g., the Compliance Manager will contact the Program Director for an extension). The reasons for the extension shall be documented in the case file. The following procedures are guides to be used except in extraordinary cases:

**(1)** Following the filing of a Notice of Contest, the Regional Director shall notify the employer that settlement negotiations will only be available at the Regional Office for a brief period following the end of the 15-working day contest period.

**(2)** If the employer expresses no interest in trying to reach a settlement agreement, the Regional Director shall attempt to find out why and forward that information, along with the case file, to the Central Office for review.



**D.4.d.**

- (3)** If negotiations are attempted but no settlement agreement is reached within three weeks of the close of the contest period the Regional Director will send the case file to the Central Office.
- (4)** When the Regional Director submits the case file to the Central Office, recommendations concerning settlement possibilities shall be included and all settlement proposals made to the employer shall be documented. A detailed explanation of the employer's reasons for contest shall be provided if known. (Information contained in an informal conference report or employer's contest letter may be referenced to satisfy this requirement).

- e. Corporate-Wide Settlement Agreements.** In certain egregious violation situations, or at an employer's request, VOSH may negotiate and enter into Corporate-Wide Settlement Agreements (CSAs) to obtain formal recognition by the employer of cited hazards and formal acceptance of the obligation to seek out and abate those hazards throughout all workplaces under its control.
- f. Court's Post-Contest Settlement (Agreed Order).** Settlement negotiations for agreed orders will be through the Commonwealth's Attorney and the Office of Legal Support after the bill of complaint has been filed with the court. Section 340 of the *Administrative Regulations Manual* requires any formal settlement agreement to be embodied in an agreed order and presented to the court for approval.
- g. Penalty Installment Payment Agreement.** Penalty Installment Payment Plans negotiated by the Regional Director will become part of the Informal Settlement Agreement. (See Appendix).

**5. Case Review Procedures.**

- a. General.** All case files will be reviewed and approved by the Compliance Manager to ensure that the files are organized in accordance with procedures, and that they are well documented, and that they are clearly presented with appropriate findings and conclusions. Significant case files shall be reviewed and approved as described in this chapter.
- b. Significant Case Review.**
  - (1) Definition of Significant Case.** Any occupational safety or health compliance case which involves one of the following conditions shall be considered a VOSH "significant case":
    - (a)** Willful/criminal willful violation;
    - (b)** Willful violations case suitable for egregious penalty treatment;

**D.5.b.**

- (c) Fatality/catastrophe;
- (d) Interest at national level identified by OSHA;
- (e) Interest by media, public officials, or other interest groups;
- (f) Identified as significant by the Commissioner;
- (g) Repeat violation (third instance or higher);
- (h) Ergonomics violations.

- (2) **Review Procedures for Significant Cases.** All significant cases shall be reviewed by the Compliance Manager, Regional Director, Program Director and the Office of Legal Support.
- (3) **Time Frame for Issuance of Citations for Significant Cases.** All citations will be issued by the Compliance Manager following the case review process. Citations will be issued no later than six (6) months following the occurrence of the alleged violations. VOSH will follow federal case law in interpreting the six month issuance requirements.
- (4) **Tracking Significant Cases.** Significant cases will be tracked by the Office of Legal Support.

- c. **Review of Contested Cases.** All contested cases not settled during an informal conference will be reviewed by the Compliance Manager, Regional Director, and Program Director.

The Program Director may refer the contested case to the Office of Legal Support for advice on drafting a settlement agreement, for preparation of a final order, or for filing a bill of complaint.

- d. **Regional Director's Review.** Compliance Managers and Regional Directors will review cases for compliance with all requirements of the FOM and other agency policy and procedures.

At a minimum, the Compliance Manager will review each of the following case file elements:

- (1) Case file organization is consistent with requirements;
- (2) Case narrative is complete, clear, and prepared in accordance with procedures;
- (3) Findings and conclusions are well documented; appropriate documentation is contained in the file;

**D.5.d.**

- (4)** All exhibits are properly numbered and tabbed;
- (5)** All required VOSH forms are completed correctly;
- (6)** Appropriate testing/sampling was done;
- (7)** Sufficient photos and witness statements are included;
- (8)** Violations are properly cited and are described sufficiently;
- (9)** Citations are written in accordance with the FOM;
- (10)** Justification is included in the file for all willful and criminal willful cases;
- (11)** Penalties were accurately calculated;
- (12)** Inspection was conducted and the file prepared in a timely manner;
- (13)** Citations are consistent with safety and health evaluation on VOSH-IW.

The Compliance Manager will always prepare written case file notes. (See Appendix). These notes will be attached to the file.

For all significant or contested cases, the Compliance Manager will also complete a case review process form. (See Appendix). When this form is used, the review notes should be attached to it. The forms then will be included in Section 2 of the case file and forwarded to the Program Director for review.

For cases where it may be appropriate to use the egregious penalty procedures, the Compliance Manager will apply the required criteria. If the case meets the criteria, the Compliance Manager will notify the Program Director who shall then notify the Commissioner. The documentation and evidence required for violation-by-violation penalties shall be added to the case file, if these are not already included.

The Regional Director will ensure that all deficiencies are corrected by the CSHO before forwarding the case file to the Program Director for review.

The case file will be forwarded to the Central Office as soon as possible, but no later than 45 days prior to the 6-month date.

- e. Program Director's Review.** The Program Director will review all significant and contested cases. The Program Director will make any comments regarding to the case file.

At a minimum, the Director will review the file to determine the following:

- D.5.e.**
- (1) Compliance Manager properly reviewed the file before forwarding it for a significant case review;
  - (2) File is organized in accordance with the procedures;
  - (3) Case narrative is clear and is written in accordance with procedures;
  - (4) All findings and conclusions are proper and well documented;
  - (5) Violations are properly cited; citations are written correctly;
  - (6) Investigation and case file preparation was completed in a timely fashion;
  - (7) Closing conference was held unless the Compliance Manager was directed otherwise and all VOSH forms have been completed accurately;
  - (8) Penalty was calculated properly.

If the Program Director determines that additional investigation or documentation is needed to substantiate the case findings or conclusions, the file will be returned to the Compliance Manager for action.

- f. The Office of Legal Support Review.** The Office of Legal Support is responsible for conducting a pre-citation issuance review of all VOSH significant cases.

The purpose of the Office of Legal Support review is to ensure that the Department's course of action in the case is legally supported by the documentation in the case file and that the evidence is sufficient to withstand a contest from the employer, or, in the case where no citation is issued, that the evidence supports the decision, and that proper investigative procedures were utilized by the inspector. The results of the review conducted by the Office of Legal Support shall be summarized in writing.

The following areas will be reviewed by the Office of Legal Support Office;

- (1) ***Prima Facie Case.*** The Office of Legal Support shall review each violation to ensure that the following elements of the *prima facie* case are sufficiently documented for each violation cited:
  - (a) Existence of a safety or health hazard;
  - (b) Content and applicability of VOSH regulation or statute and employer violation of the regulation, statute or general duty clause;

**D.5.f.(1)**

- (c)** Employee exposure;
    - (d)** Employer knowledge;
  - (2) Citation Language.** Each violation on the citation shall be reviewed to ensure that the language is used accurately and reflects the meaning and intent of the regulation or statute cited.
  - (3) General Duty Violations.** This will be reviewed to ensure compliance with the requirements in the FOM.
  - (4) Classification of Violations.** These shall be reviewed to ensure accuracy, i.e., Serious vs. Other-than-Serious; or Repeat vs. Willful.
  - (5) Citation for Multi-Employer Worksites.** These are reviewed to ensure that the right employer was cited. Unusual issues include employee vs. independent contractor relationship and general contractor/subcontractor vs. owner/independent contractor.
  - (6) Violation-by-Violation Penalties.** These shall be reviewed to evaluate the documentation and other evidence and to provide an opinion on the merits of the case.
  - (7) Affirmative Defenses.** These must be evidenced in the documentation contained in the case file.
  - (8) Training Violations.** These will be reviewed for appropriateness.
  - (9) Case File Documentation.** This must be sufficient to support all findings and conclusions.
- g. CSHO Notification.** The Compliance Manager shall inform the CSHO of the results of the significant case review and provide him with a copy of the completed case review process form for that file. (See Appendix).

**E. LEGAL CONSIDERATIONS.**

- 1. General.** During the course of a CSHO's work, numerous questions can arise which require legal advice. This section will not substitute for contact with the Office of Legal Support or the Assistant Attorney General, but may serve to answer some initial questions. The legal authority for the VOSH program, subpoenas of VOSH personnel, definitions of employees and contest procedures are among the topics covered in this section. The Office of Legal Support should be contacted if any questions arise about the legal considerations addressed under this chapter.

**E. 2. VOSH Program Authority.**

- a. General.** Authority for VOSH to conduct inspections is derived from the State Constitution. While the federal program relies on the commerce clause of the U.S. Constitution for authority to inspect, the VOSH program relies on the state police power found in the Virginia Constitution. During an inspection, federal OSHA must ensure that an employer is engaged in interstate commerce, a step VOSH does not have to do. All employers are subject to the police power of the state and therefore are subject to VOSH inspection, except those industry sectors in which federal OSHA has retained direct enforcement authority or for which 4(b)(1) of the OSH Act provides federal preemption.
- b. Employer Rights.** While employers are subject to inspection by VOSH, the Fourth Amendment of the U.S. Constitution and the Virginia Constitution guarantees them the right to be free from unreasonable searches and seizures. So, they may insist on a warrant before VOSH inspects them. The warrant shall be issued by a court based on a finding of probable cause to search. Two court cases have made clear the requirements of probable cause for VOSH:

**(1) *Marshall v. Barlows.*** Probable cause to issue a warrant may be based on:

- (a)** specific evidence of an existing violation (e.g., employee complaint), or
- (b)** showing of reasonable legislative or administrative standards for conducting an inspection, (e.g., general schedule or special emphasis programs).

**(2) *Amato v. Mosher Steel.*** This case has further defined reasonable legislative or administrative standards by requiring that the inspection program be based on reasonable standards that are applied to a particular workplace in a neutral and fair manner. (See § 40.1-49.9, *Code of Virginia.*)

*NOTE: Under no circumstances is an employer to be treated any differently because he has exercised his constitutional right to require a warrant.*

- c. Jurisdictional Limitations.** VOSH does not have authority to inspect working conditions of:

- (1)** Employees not covered by the federal OSH Act, including but not limited to:
- (a)** Mines and quarries.
  - (b)** Railroads.
  - (c)** Nuclear facilities.

***NOTE:** VOSH has “Memoranda of Understanding” with certain federal safety agencies which further define the scope of VOSH’s inspection authority in the above industries. Contact the Office of Legal Support when jurisdiction questions arise.*

- (2)** Employees of the United States.
- (3)** Employees who, although employed by private employers, are working within enclaves of the federal government where the United States federal government exercises exclusive jurisdiction.
- (4)** Private sector maritime employees.

***NOTE:** VOSH has a maritime standard for public sector employees, but does not cover private sector maritime employees.*

### **3. Employees for Compliance Purposes – Definition.**

VOSH is often confronted with situations in which the definition of employee is important. There are cases in which issuing a citation depends on whether the individual exposed to the hazard is an employee for purposes of the law. Employers are only subject to § 40.1-49.4, *Code of Virginia*, if they are engaged in business and have one or more employees.

**a. Examples of “Employees.”** In the following situations, an individual would be considered an employee for purposes of the law:

- (1)** A management representative such as a company president, vice-president or plant manager is an employee for purposes of the law when he is performing work on the site for the employer and is exposed to the hazard cited.

**EXAMPLES:** The president of a company is working near a hazard after all other employees have left the premises. He is entitled to the protections of occupational safety and health laws as much as any other worker. A company vice-president who spends 40 hours per week working with a shovel in an excavation is an employee.

- (2)** A partner in a partnership is an employee for the purposes of the law when he is performing work on the site for the partnership and is exposed to the cited hazard.

**EXAMPLE:** A “silent partner” has invested in a business and received half of the profits worked in the store six or seven hours per week when the other partner was absent. This silent partner considered his role to be just looking after the investment, but was held by a court to be an employee because he was actually performing duties done by employees.

**E.3.a.**

- (3)** Stockholders in a corporation are considered employees for the purpose of the law when they are performing work on the site for the employer/corporation and are exposed to a cited hazard.

**EXAMPLE:** Three stockholders of a company were forced to work as production workers for a weekly salary for the company after it had lost money for two consecutive years. They were exposed to a hazard and were considered employees because they were doing production work for the company.

- (4)** An employer's family members are employees for the purposes of the law when they are performing work on the site for the employer and are exposed to a cited hazard.

**EXAMPLE:** An employer who has three members of his family as his only workers is subject to the law because his family members are doing work for the company and are as entitled to the protection of VOSH as any other worker.

*NOTE: Immediate family members of a farm employer are granted a specific exemption from OSHA regulations under the Federal Appropriations Act (Refer to VOSH Program Directive 02-003A or its successor).*

- b. Examples of "Not Employee."** In the following situations, the individuals exposed to the hazard would not be considered employees:

- (1)** A self-employed person or a sole owner of a business who is the only one exposed to the hazard cited. (See discussion on "Employees vs. Independent Contractors").
- (2)** Any person exposed to the hazard cited who is not doing any work for the employer (e.g., bystander, or stockholder or partner not doing any work for the company).

- c. Volunteers.** Members of volunteer rescue squads and volunteer fire departments and other volunteers serving the state pursuant to the Virginia State Government Volunteers Act are not public employees and are therefore not covered by VOSH. Volunteers serve without pay or benefits, except those benefits listed in § 2.1-558, *Code of Virginia*. Where benefits go beyond, or are different from, those listed in § 2.1-558, the CSHO shall consult with the Compliance Manager who may contact the Office of Legal Support, if necessary.

*NOTE: Consult with the Office of Legal Support in all cases when questions arise about who is an employee.*



**F. Judicial Review of VOSH Contested Cases.** Section 40.1-49.4, *et. seq.*, *Code of Virginia*, requires the Commissioner, upon receipt of a notice of contest of a citation, proposed penalty or order of abatement, to begin proceedings to have a contested case heard in the Circuit Court for the jurisdiction where the violation occurred. The Commonwealth's Attorney for that jurisdiction represents the Department before the Circuit Court in any criminal or civil matter involving the compliance of Virginia's Occupational Safety and Health laws, pursuant to § 40.1-49.6, *Code of Virginia*. Assistance from the Office of the Attorney General is also available.

**1. Transmittal of Notice of Contest.**

**a. General.**

- (1) Once a letter of contest regarding a VOSH citation is received, it is reviewed by the appropriate Compliance Manager to determine which parts of the citation are contested. The Office of Legal Support shall be consulted in questionable cases.
- (2) The envelope that contained the Notice of Contest shall be retained in the case file with the postmark intact.
- (3) Where the Compliance Manager is certain that the Notice of Contest was not received, e.g., postmarked, within the 15-working day period allowed for contest, the employer should be advised of the statutory time limitation. The employer or employee shall be informed that the court has no jurisdiction to hear the case when the Notice of Contest was not filed within the 15-working days allowed and, therefore, that the citation, abatement order and proposed penalty are final orders.
- (4) If the Notice of Contest is submitted to the Compliance Manager after the 15-working day period but the Notice contests only the reasonableness of the abatement period, it shall be treated as a Petition for Extension of Abatement Time and handled in accordance with the relevant instructions (cited in this chapter).
- (5) If written communication is received from an employer containing objection, criticism, or other adverse comment about a citation or proposed penalty which does not clearly appear to be a Notice of Contest, the Compliance Manager should contact the employer as soon as possible to clarify the intent of the communication. Such clarification must be obtained prior to the end of the 15-working day contest period. The Compliance Manager shall not attempt to talk the employer out of the contest, but shall seek only to clarify whether the employer intends the document to be a Notice of Contest. The Compliance Manager shall write a memorandum for the case file regarding the substance of this conversation. If the employer did not intend the document to be a Notice of Contest, it shall be retained in the case file with the memorandum of the contact with the employer.

- F.1.a.**
- (6)** If the Regional Director's contact with the employer reveals a desire for an informal conference, the employer shall be informed that an informal conference does not stay the running of the 15-working day period for contest.
- 2. Post-Filing VOSH Activities.** After the VOSH bill of complaint has been filed with the Circuit Court, there shall be no investigations of, or conferences with, the employer without clearance from the Office of Legal Support and the Office of the Commonwealth's Attorney.
- 3. Elements of Proof in a VOSH Case.** To establish the existence of a VOSH violation, a CSHO must document four elements during an investigation. These elements are:
- a. A standard, regulation or a statute applies to the hazard in question.**
- (1)** Construction standards apply only to employers with employees engaged in construction work. Construction work includes any work consisting of construction, alteration or repair, including painting or decoration of any structure. Work performed in one of the traditional construction trades (e.g., plumbing, carpentry, masonry, roofing, etc.), whether performed on a construction site or in a manufacturing plant, will normally fall under the definition of construction work. Alteration or repair performed on a structure, as opposed to a piece of machinery or equipment, will normally be considered construction work. Workers engaged in operations which are an integral part of, or involved with, the performance of construction work are protected by the construction standards. See § 130.1 of the *Administrative Regulations Manual*. For example, an employer who is dismantling cranes used on a construction site is performing work that is integral to the construction industry, and is therefore subject to construction standards.
- (2)** Agricultural standards apply exclusively to employers with employees engaged in agricultural operations.
- (3)** Private sector maritime employers are covered by federal OSHA. Maritime standards apply only to public sector employers with employees engaged in maritime activities.
- (4)** General Industry standards apply to all covered employees unless the general industry standard is limited to a certain type of business or the construction, maritime or agricultural standards apply. Certain general industry standards have been included by reference in the construction, maritime or agricultural standards. The CSHO should check the particular standard for the industry being inspected in order to determine which general industry standards apply.

- F.3.**
- b. The Employer has Violated the Standard, Regulation or Statute in Question.** See this chapter for information on violations.
  - c. The Employer has Actual Knowledge or Should have Known of the Violative Condition.**
    - (1)** Proof of a supervisor's knowledge can be imputed to the employer.
    - (2)** Proof of the employer's knowledge of the physical condition or hazard constituting the violation is enough for this element. It is not necessary to show knowledge of the law or standard to prove a violation, but it will be necessary for proof of a willful violation.
  - d. An Employee of the Cited Employer is Exposed to the Violative Condition.** See sections related to this topic for more information on this subject.
- 4. Six-Month Statute of Limitations.** Section 40.1-49.4 A.3., *Code of Virginia*, requires no citation to be issued after six months following the occurrence of any alleged violation. VOSH will follow applicable federal case law (and any applicable state case law) on application of the 6 month statute of limitations.
- 5. Outline of Legal Process.**
- a. General.**
    - (1)** After a Notice of Contest is received and all reasonable attempts at settlement have failed, the Program Director may authorize a request to file a bill of complaint in Circuit Court. The Office of Legal Support will draft the request for issuance. The Office of Legal Support will also arrange contact with the Commonwealth's Attorney in the jurisdiction where the violation occurred. A copy of the case file will be sent to the Commonwealth's Attorney.
    - (2)** The Staff Attorneys assigned to the case will contact the Commonwealth's Attorney to arrange a date to file the bill of complaint.
    - (3)** Attempts may be made to settle the case by the Office of Legal Support and the Program Manager even after the filing of the suit. If a settlement cannot be reached, the case will proceed to trial.
    - (4)** Prior to trial, both parties may engage in discovery as authorized by § 40.1-49.4L.2., *Code of Virginia*. Discovery may include the release of the CSHO's notes, findings and narrative.
    - (5)** Trial preparation will include at least one pretrial meeting between the Department (the Staff Attorney, CSHO and/or Compliance Manager) and the Commonwealth's Attorney.

- (6) The Commonwealth's Attorney will present the case on behalf of VOSH or may appoint an OLS attorney to serve as special assistant to the Commonwealth's Attorney. The Commonwealth's Attorney will generally call the CSHO as a witness to explain the events leading up to the citation.
- (7) After all testimony is heard at the trial, the judge will issue an order affirming, modifying or vacating the citation or proposed penalty.

## **G. Appeals.**

- 1. **General.** Appeals from Circuit Court may be heard by the Virginia Court of Appeals. Should the Circuit Court judge not decide any or all issues in a case for VOSH, the Department has thirty (30) days to file an appeal with the Virginia Court of Appeals. Because of this time limitation, the following procedures must be done in a timely manner.
- 2. **The Office of Legal Support Memorandum.** After each trial, the Staff Attorney who attended the trial, in consultation with other VOSH personnel in attendance, will prepare a memorandum outlining the results of the trial. The memorandum will discuss the strengths and weaknesses of the case and its result, and make a recommendation regarding the appeal.
  - a. **General.**
    - (1) The memo will be given to the Director of the Office of Legal Support as soon as possible after the entry of the Final Order. A copy of this memorandum will be sent to the Assistant Attorney General.
    - (2) The Director of the Office of Legal Support will review the memorandum and make a recommendation on appeal immediately thereafter. This recommendation will be given to the Program Director, the Director of VOSH Programs and Commissioner for review.
    - (3) The Commissioner will make a final recommendation on the appeal to the Commissioner within three working days.
- 3. **Commissioner's Decision.** The final decision on appealing the judge's decision will be made by the Commissioner after consultation with the Attorney General's Office and/or the Commonwealth's Attorney.